Ombudsman

National Defence and Canadian Forces
Défense nationale et Forces canadiennes

A REGULATORY REGIME FOR THE OMBUDSMAN DEPARTMENT OF NATIONAL DEFENCE AND CANADIAN FORCES

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INTRODUCTION

THE OBJECTIVE

The key principles necessary for the effective operation of the Office of the Ombudsman, National Defence and Canadian Forces, are:

- impartiality
- independence
- credibility, and
- confidentiality

These "principles of efficacy" are so central to dispute resolution that there is no need to define them further. They are notorious and well understood. Suffice it to say that the mandate of the Ombudsman depends entirely on the Office of the Ombudsman having these characteristics. That mandate is described in Ministerial Directive 1. The Ombudsman is to "act on the Minister's behalf, independent of the chain of command, as a neutral and objective sounding board, mediator and reporter on matters related to the Department of National Defence (DND) and the Canadian Forces (CF)."

Having a "neutral and objective sounding board, mediator and reporter" is not, of course, an end itself. It is the means to an end, namely ensuring "openness, transparency and accountability within DND/CF,"[1] which in turn is the means to ensure that unfairness and injustice within DND/CF can be effectively addressed so that the rights of individuals are respected, morale in DND/CF is maintained, and public confidence in the operation of DND/CF is preserved and fostered. Ultimately this will contribute to substantial and long-lasting improvement to the welfare of members of DND/CF. In essence, then, the Office of the Ombudsman is intended to:

- ensure that the rights of individuals are respected;
- ensure that morale in DND/CF is maintained by generating confidence in the fair and equitable treatment of its members; and
- preserve and foster public confidence in the operation of the DND/CF

The co-operation of all members of DND/CF is required to meet these objectives. Yet more is needed than voluntary co-operation. Complete dependence on the voluntary co-operation of members of DND/CF would jeopardize the independence and credibility of the Ombudsman's Office. The Ombudsman must have sufficient authority to secure that co-operation where it is not forthcoming, or to accomplish his task in the face of opposition, should opposition exist. It is the objective of this report to provide detail on what form pending regulations must take in order to ensure an effective and credible Office of the Ombudsman, DND/CF.

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[1] Annual Report 98-99, Ombudsman, National Defence and Canadian Forces "*Looking Ahead*" at 1.

THE EVOLUTION OF THE OFFICE OF THE OMBUDSMAN, DND/CF

The necessary authority to function was not handed to the Ombudsman the day the office was conceived. Instead, the development of the Office of Ombudsman, DND/CF has been a story of both inspiration and evolution. Its history has been that of a sustained march towards the embodiment of these "principles of efficacy." The Office of the Ombudsman, DND/CF had its genesis with the Somalia Inquiry, which recommended the establishment of an office of Inspector General, with widespread power to evaluate systemic problems in the military justice system; conduct investigations into misconduct, waste and abuse; protect individuals from abuse of authority, including racial discrimination; and protect those who report wrongdoing from reprisals. In November 1995, a recently retired Brigadier General, retained to review and assess available options, recommended instead, the creation of a military ombudsman. In 1997, the chair of the Special Advisory Group on Military Justice, retired Supreme Court of Canada Chief Justice Brian Dickson, revived that recommendation, calling for the creation of "... an independent office of complaint and review system oversight ... such as a military Ombudsman." Then Minister of National Defence, the Honourable Doug Young, approved the establishment of an Office of the DND/CF Ombudsman, who would report to the Deputy Minister and Chief of Defence Staff.

In the fall of 1997, the current Minister of National Defence, the Honourable Art Eggleton, decided to establish such an Office, but with one significant change. The Ombudsman would report directly to the Minister, thereby making him independent of the chain of command as was contemplated by Chief Justice Dickson. The current Ombudsman was appointed on 9 June 1998. No operating framework was established prior to that appointment, so the Ombudsman and staff began an extensive process of research and consultation, involving ombudsmen's offices from many fields, both domestically and internationally. On 20 January 1999, the report, *The Way Forward*, was presented to the Minister, based on that research. The report outlined 67 recommendations for an effective and credible office.

During the next several months, extensive meetings were held with the Minister, the Deputy Minister, and members of DND/CF. On 16 June 1999, Ministerial Directives were adopted by the Minister of National Defence to guide the operation of the Ombudsman's office for a period of six months. This was done both to permit the Ombudsman to commence processing complaints without having to depend on *ad hoc* co-operation, and to provide a "test period" during which the efficacy of the regime established by those Ministerial Directives could be examined. It was resolved that, at the end of that period, the Ministerial Directives would "be reviewed, amended as required, and subsequently incorporated into a regulation." The six-month review period expired yesterday, the 15 December 1999.

While the decision has been taken to establish this framework by Regulations under the *National Defence Act* at this time, ultimately, in order to ensure respect for the principles of impartiality, independence, credibility and confidentiality, this framework must be included in the Act itself. There is no reason why the Office of the Ombudsman should be the sole institution for investigating and resolving disputes relating to the Department of National Defence that is not protected by legislation. Delegated legislation in the form of regulations is a large step forward, however leaving the Office of the Ombudsman to depend on delegated legislation for its continuation and definition can only diminish its credibility in the long-run. Symbolically, it is made to appear to be less important than other National Defence institutions. Moreover, so long as the

Office of the Ombudsman exists in regulation, the Office can be weakened or even abolished without the approval of Parliament. The Office of the Ombudsman is the product of the initiative and foresight of a single Minister of National Defence, from a particular political party. Its perpetuation should not depend on the vagaries of personal commitment exhibited by successive ministers. Agreement in principle, at least, should be given to the objective of amending the *National Defence Act* to include the Office of the Ombudsman.

It is worth noting, as well, that not all issues of concern can be addressed profitably at this time. For example, the Office of the Ombudsman has contended from the outset that it can best fulfill its function by obtaining statutory exemptions from the *Access to Information Act* and the *Privacy Act*. Moreover, although the Ombudsman has received a legal opinion that he can resist disclosure of sensitive material by invoking case-by-case privilege, clear legislated protection against legal compellability of material from the Office of the Ombudsman, or the testimony of the Ombudsman and his staff, is required to protect confidential information. This is needed not only to protect confidences bestowed by complainants, but also to preserve confidence over the broad array of material that the Office of the Ombudsman gains access to from a variety of government sources in the course of its investigations. These issues, however, are matters for another day. We see this as the occasion for converting the Ministerial Directives into regulations, with the focus, for now, on those issues that have been treated in the Ministerial Directives. Bearing in mind, then, that at this stage, the next step in the evolution of the Office of the Ombudsman is to develop regulations, this report describes what is required.

The draft regulations that follow are the product of both experience and deep reflection. They have been drafted with the assistance of independent legal counsel to embody what is required to translate Ministerial Directives into effective rules of law. They are identified and discussed throughout this report. The entire package of draft regulations is attached to this report. (Appendix I)

CHAPTER I

THE PRINCIPLES USED IN DEFINING THE REGULATORY REGIME

On balance, the Ministerial Directives, coupled with the co-operation that the Ombudsman has received to date from all interested parties, have provided the Ombudsman with the ability to function effectively. The results generated by the Office to date bear that out. As of 29 October 1999, after only four months in operation, the Office had opened 785 files. Of those, 526 were "closed." As of 29 November, the Office had dealt with 979 complaints from 901 complainants. The Office of the Ombudsman has conducted, or is in the process of conducting, 40 major field investigations in which systemic issues are involved, including pre-June 15, 1998 cases. Recently, a POLARA poll entitled "Canadians' Opinions on the Canadian Forces (CF) and Related Military Issues" recognized how successful the Office has been in establishing credibility. The DND/CF Ombudsman was considered "very credible" by more respondents than any other DND spokesperson, with the exception only of the Prime Minister. This record bears witness to the efficacy of the Ministerial Directives and makes it appropriate to use the existing directives as the foundation for the regulations that are to be adopted.

At the same time, the success experienced by the Office should not be viewed simplistically to suggest that there is no need for amendment to those Directives in some areas. Wisely, at the time the Ministerial Directives were adopted, it was anticipated that "they [would] be reviewed [and] amended as required." As the Minister of National Defence said on 16 June 1999, when announcing the mandate of the Ombudsman:

> As any new organization knows, experience is perhaps the best tool for evaluating the success of any operating framework.... Changes if necessary will be made in order to ensure that the Ombudsman's Office succeeds in making a real difference in the Forces and the department.

As was anticipated, isolated events have demonstrated that some of the Ministerial Directives, as presently drafted, are inadequate to secure the objectives of the Office. These experiences have made apparent the need to modify some of these Directives.

Modification is not required solely where events have demonstrated difficulties. Six months is a short period of time within which to identify all potential shortcomings. Indeed, it would be a mistake to find too much comfort in the record of success achieved by this Office. In assessing the efficacy of the Ministerial Directives in light of this record, three things should be borne in mind:

1) almost all of the cases resolved were matters in which the underlying facts were not materially in dispute;

2) substantial goodwill and co-operation have been demonstrated by DND/CF personnel; and

3) an examination of the Ministerial Directives that were adopted discloses that in some cases, the provisions do not always respect the principles of efficacy, principles necessary to the long-range, effective operation of the Ombudsman's Office.

Since almost all of the cases resolved involved matters in which the underlying facts were not materially in dispute, the efficacy of the Ministerial Directives in permitting the effective discovery of the facts underlying a complaint has yet to be truly tested. The question is not whether the office has, to date, been able to work with these directives. It is how to establish the proper institutional framework for the Office to fulfil its mandate when tested by the most challenging circumstances.

The substantial goodwill and co-operation that has been demonstrated by DND/CF personnel is commendable and can be given substantial credit for the success of the Ombudsman's Office. Yet, as indicated above, the efficacy of the Office cannot depend on voluntary co-operation. The process will not maintain its credibility unless the Ombudsman is empowered to achieve similar results in the event that voluntary co-operation is not forthcoming. The recent history of co-operation has been, in large part, a reflection of the leadership and mutual respect amongst senior officers, officials and the Ombudsman and his staff. However, the individuals in these positions will change over the years. Public confidence requires institutional guarantees of effectiveness that do not rely solely on the personalities of the individuals who are involved. It would be wrong to assume, based on the success to date, that it will be sufficient to draft regulations that do no more than incorporate the current directives. In the long run, this could prove to be a serious error.

The third point is that the Ministerial Directives do not always respect sufficiently the principles necessary to the long-range, effective operation of the Ombudsman's Office. This also makes the wholesale adoption of the Ministerial Directives insufficient. In those areas where the directives do not secure adequately the central principles of efficacy, they must be amended, for example, to ensure effective fact-finding where co-operation may not be forthcoming.

In short, the position of the Ombudsman with respect to the development of regulations is animated by three operating principles.

- First, the current Ministerial Directives should provide the central structure for the regulations that are adopted.

- Second, they should be modified where experience has demonstrated difficulties or shortcomings.

- Third, they should be modified where they do not respect sufficiently the principles necessary to the long-range, effective operation of the Ombudsman's Office. The Ministerial Directives must be tested against the principles of impartiality, independence, credibility and confidentiality to see what changes, if any, are required.

The results of that review are found below. In the pages that follow, draft regulations are included. These remain true to both the Ministerial Directives and the principles we have identified, although even when no change in substance is made, the wording may have been modified to accord with sound drafting practices.

CHAPTER II

THE PROPOSED REGULATIONS

THE MANDATE

Draft Regulations

The draft regulation defining the mandate of the Ombudsman is as follows:

3. (1) The Ombudsman designated under section 5 of the National Defence Act shall, on the Minister's behalf,

(a) act as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the DND and CF,

(b) act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress within the DND and CF, and

(c) serve to contribute to substantial and long-lasting improvements in the welfare of employees and members of the DND and CF community,

and in the performance of those duties and functions, the Ombudsman shall be independent from the management and chain of command of the DND and CF and shall report directly to and be accountable to the Minister.

(2) If a complaint is made to the Ombudsman about the handling of complaints by or under existing mechanisms, including a redress of grievance, the Ombudsman shall review the process to ensure that individuals are treated in a fair and equitable fashion.

Ministerial Directives

The current Ministerial Directives provide:

1. The Ombudsman is designated under section 5 of the National Defence Act to act on the Minister's behalf, independent of the chain of command, as a neutral and objective sounding board, mediator and reporter on matters related to the Department of National Defence (DND) and the Canadian Forces (CF), as described by these directives.

2. The Ombudsman acts as a direct source of information, referral and education to assist individuals to access existing channels of assistance and redress within DND/CF. In the exercise of his/her mandate he/she is independent from the chain of command and Departmental management and reports directly to and is accountable to the Minister of National Defence. The Ombudsman's office will serve to contribute to substantial and long-lasting improvements to the welfare of members

of the DND/CF community. Where a complaint is made about the treatment of complaints by existing mechanisms, including a redress of grievance, the Ombudsman will review the process to ensure that individuals are treated in a fair and equitable fashion.

Commentary

The Ministerial Directives contain an appropriate description of the function of the Ombudsman, with one exception. The word "investigator" has been added in the draft regulation to the phrase "sounding board, mediator and reporter." The central functions of any effective ombudsman are to investigate and to report. The fourth Ministerial Directive recognizes the importance of investigation by stating that the Ombudsman "will thoroughly investigate complaints." This is what an ombudsman does. This is what complainants and the public expect an ombudsman to do. Indeed, this is what we have been doing since 16 June 1999. The restrained language in the first Ministerial Directive presumably intended to subsume the investigative function under the term "reporting," since it is implicit that one cannot report responsibly without first investigating. There is no need for such obscurity in the regulations. A clear and open statement of the function of the Ombudsman is required so that potential complainants and respondents will not be misled about the nature of the Ombudsman's function.

ACCESS TO THE OMBUDSMAN'S OFFICE

Draft Regulations

The draft regulation describing when access is granted to the Office of the Ombudsman is as follows:

5. Any person may bring a complaint to the Ombudsman directly and free of charge, if the complaint relates to that person's treatment by or dealings with

(a) the DND or CF;

(b) a member or employee of the DND or CF; or

(c) an agent acting on behalf of the DND or CF or personnel of that agent.

Ministerial Directives

The current Ministerial Directive dealing with access to the Ombudsman's Office is framed by describing those who have access to that office. It reads:

3. Access to the Ombudsman's Office:

Any current or former Regular or Reserve Force member of the Canadian Forces,

Any current or former member of the Cadet movement, or a family member of such a person,

Any family member of a current or former Regular or Reserve Force member of the Canadian Forces,

Any current or former DND member or employee, and

Any non-public fund employee of DND

may bring a complaint to the Ombudsman's office, directly and free of charge, where the matter complained about relates directly to DND or the CF.

The Ombudsman's office will refer any complaints he/she receives, which fall within the jurisdiction of the Department of Veterans Affairs or the Veterans Review and Appeal Board, to that Department.

Commentary

This Ministerial Directive is consistent with the initial *Backgrounder Documentation*, 9 June 1998, and with the "core constituency" described in *The Way Forward* (at 2). It is also the model used for some other ombudsmen's offices, such as the Australian Defence Force Ombudsman. The effect of listing potential complainants, however, is to preclude access to the Ombudsman by those who are not listed specifically, even if the conduct of members of the Canadian Forces towards them is unfair or unjust. Two examples of persons excluded by the Ministerial Directives are those who are seeking to become members of the Canadian Forces and those who are working within DND/CF, not as members or employees but on exchanges or as contractors. The Ministerial Directives have prevented the Ombudsman from resolving a number of complaints from such sources about unfairness or injustice on the part of DND/CF personnel. A complaint has been received, for example, by a person on exchange with the Canadian Forces who is a member of an allied force. As the *Annual Report 1998-99* shows, disregarding anonymous complaints, 17 of the 252 complaints received by the time that report was issued came from persons not entitled under the Ministerial Directive to have access to the Ombudsman. In particular, 3 came from contractors and 14 came from private citizens or other groups.

Whether the model adopted in the Ministerial Directives is adequate depends entirely on the objectives behind the Ombudsman's Office. Those objectives, as stated above, are to:

(a) ensure that the rights of individuals are respected;
(b) ensure that morale in the DND/CF is maintained by generating confidence of fair and equitable treatment of its members; and
(c) preserve and foster public confidence in the operation of the DND/CF

The approach taken in Ministerial Directive 3 is adequate to secure the second of these objectives, but not the first, and particularly not the third.

Consider, for example, an applicant to the military. If that applicant is subjected to sexual harassment, discrimination, or other degrading treatment, the Ombudsman cannot become involved even though the rights of that individual have not been respected by persons within DND/CF, while

acting in the course of their duty. Public confidence in the operation of DND/CF could well be harmed if a meaningful solution is not provided in such cases, and to the extent that public confidence is impaired, it will have a rebound effect on morale within the armed forces. Members of DND/CF have an interest in belonging to an organization in which the rights of all individuals are respected, and which is respected, in turn, by the public. Moreover, the Government of Canada, and particularly the Minister of National Defence, has an interest in ensuring the fair treatment of all Canadians, in their dealings with the military. Although a complainant may not be a member of DND/CF, there should therefore be a mechanism for dealing with unfair actions by those within the military.

It is true that the Minister of National Defence can always enlarge the mandate of the Ombudsman on a case-by-case basis by referring matters to the Office of the Ombudsman. There are strong reasons why the jurisdiction of the Ombudsman should not depend on such Ministerial referrals, however. While Ministerial referrals relating to systemic matters have an important place, if this authority is used to select which complaints will be investigated on a case-by-case basis, the appearance of politically selective decision-making may be created. In such circumstances the Minister is placed in a vulnerable position. Moreover, the independence of the Ombudsman will be compromised. His ability to resolve what may be real and important problems will depend entirely on the opinion of the incumbent Minister as to whether the problem should be solved.

While there are other agencies both outside and inside DND/CF to deal with some of the conduct by members towards non-personnel, in many cases those agencies will not be in as good a position as the Ombudsman to forge solutions. The Ombudsman is particularly well suited to assist in resolving many of the issues that could arise under the expanded jurisdiction for the following reasons:

(a) First, the function of the Ombudsman as an informal mediator can provide an effective and appropriate way to solve some of these problems expeditiously at an informal level. This could prevent such incidents from becoming embarrassments to DND/CF or the Minister of National Defence by escalating into human rights complaints or even criminal charges. It could also avoid the delay and expense of such formal proceedings.

(b) Second, the problem in question may be a systemic one, in which case the Ombudsman is best-situated to deal with it in a meaningful way to encourage long-range changes.

(c) Third, using the Office of the Ombudsman removes the need, where there is no established dispute settlement agency to deal with the relevant problem, of having to retain independent contractors (such as investigators and mediators) to assist in making reports and providing solutions.

(d) Fourth, even where existing channels are in place, part of the mandate of the Ombudsman is to assist individuals in accessing those channels that exist within the DND/CF and to ensure that those channels are operating properly. Assume, for example, that the complainant seeks to utilize other channels within DND/CF to address the complaint but is not treated fairly during the ensuing investigation.

Under the existing Ministerial Directives the Ombudsman would still be precluded from assisting and is powerless to ensure that dispute settlement processes within the armed forces are working well.

(e) Finally, even where there are potential agencies outside of the military for effectively addressing the impugned conduct, a solution internal to the Department of National Defence would be far more effective in preserving and fostering public confidence in the operation of DND/CF. It might also ensure that the complainant feels comfortable enough with the institution, for example, to continue her efforts at recruitment. The Office of the Ombudsman is poised to assist in a true reconciliation.

For these reasons, the mandate of the Ombudsman in the current Ministerial Directives, should be improved. Instead of listing eligible complainants, it should simply specify, as the draft regulation does, that anyone may bring a complaint to the Ombudsman's office, directly and free of charge, where the matter complained about relates directly to DND or CF.

This way of defining the jurisdiction of ombudsmen is not at all exceptional. Indeed, it is the rule. The mandate for provincial ombudsmen is defined according to the activity complained about, rather than by listing authorized complainants. For example, the *British Columbia Ombudsman Act* empowers the Ombudsman to investigate complaints about actions "by an authority." The term authority is defined in a schedule to the Act.

Of course, the Office of the Ombudsman will be in a position to prevent this increased mandate from causing undue inconvenience and expense. The discretion authorized in Ministerial Directive 6 and confirmed in draft Regulation 7 to choose whether to pursue complaints in the public interest, can ensure that the system does not become clogged with unmeritorious or nuisance complaints. It provides an effective screening mechanism for complaints.

INVESTIGATION

The current Ministerial Directives deal with a number of issues relating to the investigation of complaints. There are Ministerial Directives addressing each of the following issues:

1) The mode of dispute resolution - Ministerial Directives 4, 5 and 7;
2) What complaints the Ombudsman may or may not act on - Ministerial Directives 6, 8, 9 and 10 and 23 (a) and (b);
3) The protocol for investigations within deployed units - Ministerial Directives 15,16,17 and 18; and
4) The mode of acquiring co-operation - Ministerial Directives 11 - 14.

We have broken down the draft regulations and related discussion according to these four topics.

For the most part, the draft regulations largely mirror the content of the Ministerial Directives on each of these topics, although there are some substantive changes. When the draft regulations were prepared, however, they were reordered to accomplish an organization that is appropriate to delegated legislation. The draft regulations do not, therefore, follow the same topic

order as the Ministerial Directives. To demonstrate the parallels and denote relevant changes, however, we have chosen to organize the following discussion using the order that is contained in the Ministerial Directives. As a result, the draft regulations reproduced below appear out of sequence.

The Mode of Dispute Resolution

Draft Regulations

The relevant draft regulations are as follows:

Resolution of problems

12. *The Ombudsman shall attempt to resolve problems at the level at which they can most efficiently and effectively be resolved and shall make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman.*

13. *(1) If in the Ombudsman's opinion an investigation is necessary to carry out the Ombudsman's mandate in connection with a complaint received by the Ombudsman, the Ombudsman shall thoroughly investigate the complaint.*

(2) If, in respect of a complaint, the Ombudsman concludes that a formal inquiry, including a Board of Inquiry pursuant to Queen's Regulations and Orders chapter 21, is necessary and appropriate, the Ombudsman may refer the matter to the appropriate authority and the convening authority shall:

(a) following the formal inquiry, inform the Ombudsman of the results of the inquiry, including any action taken, and refer the matter back to the Ombudsman to be dealt with as the Ombudsman deems appropriate in accordance with these Regulations; or

(b) if a decision is taken that no formal inquiry is to be convened, inform the Ombudsman of that fact and the reasons for the decision.

(3) The Ombudsman shall, whenever possible, attempt with the full and complete cooperation of all parties, to complete an investigation within 60 days of its commencement.

8. *(1) Except in circumstances that the Ombudsman considers to be compelling, the Ombudsman shall not deal with a complaint if the complainant has not, within the applicable time limit, first availed himself or herself of one or more of the following existing mechanisms available to the complainant:*

(a) the CF Redress of Grievance System,
(b) the Military Police Complaints Commission,
(c) the Public service grievance and complaints system, or
(d) the Security Intelligence Review Committee.

(2) For the purpose of paragraph (1)(c), the Public service grievance and complaints system includes formal complaints mechanisms and rights of appeal to the Public Service Commission under the Public Service Employment Act, rights of grievance and appeal to the Public Service Staff Relations Board and review and appeal procedures in relation to workers compensation under the Government Employees Compensation Act and rights of appeal to Management Review Boards of the public service health and dental plans.

Ministerial Directives

Ministerial Directives 4, 5 and 7 provide in turn:

4. *The Ombudsman will attempt to resolve problems at the level where they can most efficiently and effectively be resolved and will make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman. Where it is necessary in his/her opinion, to carry out his/her mandate, the Ombudsman will thoroughly investigate complaints* ***brought to his/her office in accordance with the authority outlined in paragraph 11 of these directives.***

5. *Where the Ombudsman concludes that a formal inquiry, including a Board of Inquiry pursuant to QR&O chapter 21, is necessary and appropriate, he/she may refer the matter to the appropriate authority. Following such formal inquiry, the convening authority will inform the Ombudsman of its completion and the results, including any action taken, and will refer the matter back to the Ombudsman to be dealt with as he/she deems appropriate, according to these directives.*

7. *Absent compelling circumstances, the Ombudsman will not pursue any complaint where the complainant has not first availed him/herself of the following existing mechanisms within the applicable time limits, where such mechanisms are available to the complainant:*

a. CF Redress of Grievance System;

b. Military Police Complaints Commission (MPCC);

c. Public service grievance and complaints system[2]*;*

d. Security Intelligence Review Committee.

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2 Public service grievance and complaints system includes formal complaints mechanisms and rights of appeal to the Public Service Commission under the *Public Service Employment Act,* rights of grievance and appeal to the Public Service Staff Relations Board (PSSRB), and review and appeal procedures in relation to worker's compensation under the *Government Employees Compensation Act* and rights of appeal to Management Review Boards of the public service health and dental plans.

Commentary

With the exception of the highlighted portion of Ministerial Directive 4, these Ministerial Directives are appropriate and workable. The highlighted portion of Ministerial Directive 4 is unnecessary. It is obvious that the Office of the Ombudsman can investigate only in accordance with its authority. This meaningless reference should be removed.

The other changes to these directives as found in the regulation are simply a function of drafting.

What complaints the Ombudsman may act on

Draft Regulations

The relevant draft regulations relating to what the Ombudsman may act on are as follows.

The first, dealing with the Ombudsman's discretion to respond to complaints that are received, provides:

7. (1) The Ombudsman may refuse to deal with a complaint or may discontinue dealing with a complaint at any stage if, in the opinion of the Ombudsman, it is in the public interest to do so.

(2) In exercising the discretion under subsection (1), the Ombudsman shall consider the following factors:

(a) whether the complaint is frivolous or vexatious;

(b) whether the complainant lacks sufficient personal interest in the matter;

(c) the age of the complaint;

(d) the amount of time between when the complainant became aware of the matters giving rise to the complaint and when the complaint is received by the Ombudsman; and

(e) the need for a judicious and efficient use of the Ombudsman's resources.

The next regulation defining what the Ombudsman may investigate, describes those matters of competence that have not originated with complaints.

4. The Ombudsman

(a) shall investigate any matter referred to the Ombudsman by written direction of the Minister; and

(b) may, subject to these Regulations, on the Ombudsman's own motion after advising the Minister, investigate any matter concerning the DND or CF.

Ministerial Directives

The corresponding Ministerial Directives are 6 and 23 (a) and (b). They provide:

6. The Ombudsman has the discretion to decline to deal with any complaint at any point in time and at any stage of his/her dealings with a matter, based upon the public interest.

In exercising this discretion, consideration will be given to the following factors:

a. the complaint is frivolous or vexatious;

b. the complainant lacks sufficient personal interest in the matter;

c. the age of the complaint;

d. the amount of time between when the complainant became aware of the matters giving rise to the complaint and when the complaint was brought to the Ombudsman's attention;

e. the need for a judicious and efficient use of resources.

23. The Ombudsman:

a) will investigate any matter upon written direction of the Minister of National Defence;

b) subject to paragraphs 7 and 8 of these directives, may investigate any matter of his or her own motion, after advising the Minister of National Defence.

Commentary

As can be seen by comparing the draft regulations and the relevant Ministerial Directives, there are no matters of substance that arise. Ministerial Directive 6 inferentially incorporates Ministerial Directive 3. It means, in effect, that the Ombudsman can investigate any complaints that he chooses after the application of these criteria, so long as the Ombudsman is not disqualified from doing so by the balance of the directives.

Limits on the Jurisdiction of the Ombudsman to Investigate

Draft Regulations

The first relevant regulation deals with the potential over-lap with Veterans matters. It provides:

> ***6.*** *If, in the opinion of the Ombudsman, the subject-matter of a complaint being considered by the Ombudsman falls within the jurisdiction of the Veterans Affairs Canada or the Veterans Review and Appeal Board, the Ombudsman shall not deal with the complaint but may refer the matter to Veterans Affairs Canada and advise the complainant of that action.*

The next relevant regulation lists other areas that the Ombudsman is prohibited from reviewing.

> ***9.*** *The Ombudsman shall not deal with any matter that requires the Ombudsman to make a review of*
>
> *(a) judicial decisions of military judges or military tribunals, such as courts martial or summary trial bodies, but nothing shall prevent the Ombudsman from making a review of any matter that relates solely to the efficacy of proceedings before judges or tribunals or the conduct of judges or members of tribunals;*
>
> *(b) matters relating to civilian employees that are the exclusive jurisdiction of the Treasury Board as the employer and bargaining agent, pursuant to the Public Service Staff Relations Act; or*
>
> *(c) a matter that falls within the investigative authority of the Communications Security Establishment Commissioner; or*
>
> *(d) a matter that arose before June 15, 1998, unless the Minister is of the opinion that it would be in the public interest, including the interest of personnel or members of the DND or CF as a whole, for the Ombudsman to deal with the matter.*

The final relevant draft regulation deals with jurisdiction and protocol in those cases involving potential criminal acts or service offences.

Criminal and other offence matters

> ***10.*** *If at any time during the course of dealing with a matter, the Ombudsman is of the opinion that there is evidence of*
>
> *(a) a criminal act or a breach of the Code of Service Discipline committed by any member or employee of the CF or DND, the Ombudsman may report*

the matter to the CFPM; or

(b) a criminal act committed by a person who is not subject to the Code of Service Discipline, the Ombudsman may report the matter to the appropriate authority.

Where offence investigation is being carried out

11. *If the Ombudsman intends to investigate a matter in respect of which there is an ongoing Military Police investigation into an alleged criminal or Code of Service Discipline offence,*

(a) the CFPM or his or her delegate shall have priority in the interviewing of witnesses; and

(b) the Military Police shall, on the request of the Ombudsman, provide the Ombudsman with copies of documents and information relating to the investigation carried out by the Military Police in connection with the matter.

Ministerial Directives

Ministerial Directives 8, 9 and 10 reflect disqualifications and limitations upon the authority of the Ombudsman to engage in certain kinds of investigations.

8. The Ombudsman's mandate does not extend to the review of:

a) military judges in the exercise of their judicial functions and military tribunals ie: courts martial and summary trials;

b) the exercise of charge laying discretion on the part of the chain of command or the National Investigative Service or the charge preferring discretion of the Director of Military Prosecutions;

c) the work of any legal advisors in providing legal advice to DND/CF or their personnel or employees or persons acting as legal counsel in relation to any proceedings;

d) matters relating to civilian employees which are the exclusive jurisdiction of Treasury Board as the employer and bargaining agents, pursuant to the Public Service Staff Relations Act; or

e) any other matter which arose before June 15, 1998, unless the Minister is of the opinion that it would be in the public interest, including the interest of members of DND/CF as a whole, for the Ombudsman to deal with the matter.

9. The Ombudsman's office will not investigate any allegation of criminal activity.

If at any time during the course of his/her dealings with a matter, the Ombudsman is of the opinion that there is evidence of a criminal act or a breach of the Code of Service Discipline on the part of any DND/CF member or personnel, he/she may report the matter to the Canadian Forces Provost Marshal (CFPM).

If at any time during the course of his/her dealings with a matter, the Ombudsman is of the opinion that there is evidence of a criminal act on the part of any person who is not subject to the Code of Service Discipline, he/she may report the matter to the appropriate authority.

Where the Ombudsman intends to investigate any matter, where there is an ongoing Military Police investigation into an alleged criminal or Code of Service Discipline offence, the CFPM or his/her delegate will have priority in the interviewing of witnesses.

10. *Notwithstanding directives #7 and #8, the Ombudsman may report complaints of abuse or delay related to the administration of the Code of Service Discipline to the appropriate authority, including the CDS, the JAG, the CFPM or the MPCC. The authority should in turn apprise the Ombudsman of any steps taken to remedy any abuse or delay.*

Notwithstanding directives #7 and #8, the Ombudsman may report complaints of abuse or delay related to the administration of the public service discipline process, including the Civilian Personnel Administrative Orders (CPAOs), to the appropriate authority, including the DM. The authority should in turn apprise the Ombudsman of any steps taken to remedy any abuse or delay.

Commentary

Each of these directives is addressed in turn.

(i) Ministerial Directive 8

Ministerial Directive 8 lists various functions that are not to be reviewed by the Ombudsman. As a matter of principle, every effort must be made to keep such exemptions at an absolute minimum. The credibility of the Office of the Ombudsman and its ability to encourage the development of fairness and openness in the operation of DND/CF requires that the Office have authority in those areas where real problems can occur. Any exemptions from the mandate of the Ombudsman must be patently justifiable. Their basis for the exemption must be apparent and justifiable. Moreover, it is important that such exemptions as granted are not broader than they have to be to achieve their purpose. Some of the existing exemptions are too broad, and they have already created difficulties for this Office.

Paragraph 8(a)

The exemption in paragraph 8(a) of the Ministerial Directives provides:

> *8. The Ombudsman's mandate does not extend to the review of:*
>
> *a) military judges in the exercise of their judicial functions and military tribunals ie: courts martial and summary trials;*

The language of this provision must be amended. The corresponding draft regulation provides:

> ***9**. The Ombudsman shall not deal with any matter that requires the Ombudsman to make a review of*
>
> > *(a) judicial decisions of military judges or military tribunals, such as courts martial or summary trial bodies, but nothing shall prevent the Ombudsman from making a review of any matter that relates solely to the efficacy of proceedings before judges or tribunals or the conduct of judges or members of tribunals.*

Ministerial Directive 8(a) is clearly intended to prevent the Ombudsman from investigating the substantive decisions of cases resolved by military tribunals. This is an understandable objective. The Ombudsman is not an appellate body. Once a decision is rendered by military judges or tribunals, it is a final resolution of a dispute, subject only to appeal or judicial review. It should not be possible for complainants to call *the decision rendered* into question by requesting the involvement of this Office. This provision is also intended to preserve judicial independence. Manifestly, it would be wrong to empower the Ombudsman to engage in any conduct that may undermine that independence.

There are, of course, issues that can arise in the course of the administration of justice that have nothing to do with either the judicial rulings arrived at in the settlement of a controversy or with the independence of the judicial decision-maker. In these areas the Ombudsman can play an important role without causing the mischief that provision 8(a) is intended to prevent. There are systemic issues that can arise relating to the administration of justice, that in no way relate to the integrity of judicial decisions or judicial independence. An example would be delay in the resolution of cases. There is no reason why the Ombudsman should not be able to inquire into such matters. This, of course, is recognized in Ministerial Directive 10, which provides the Ombudsman with specific authority to look into issues of delay.

Of course, delay is only one example. Other operational issues relating to the administration of justice can arise. Assume, for example, that administratively, the practice is adopted of paying transportation costs for prosecutorial witnesses in military tribunals, but not for defence witnesses. Judges may not be in a position to address such issues. These are the kinds of issues on which the Ombudsman can offer significant assistance, without undermining the efficacy of particular judgments or judicial decisions.

There are even non-systemic issues that may require resolution in the public interest, but which have nothing to do with the particular rulings provided by military tribunals and which do not raise questions of judicial independence. These include matters relating to the conduct of judicial officers and members of military tribunals. While it is true that the "exercise of the judicial function" is the boundary for proscribing executive action in relation to the judiciary in accordance with the principle of judicial independence, this is only so if the term "judicial function" is understood to mean "adjudicative function." Independence is not threatened when an inquiry involves a quasi-judicial assessment of potential misconduct that may be engaged in, in the exercise of the judicial function. For example, assume that an adjudicator in a military tribunal employs sexist or racist language. This happens from time to time with judges outside of the Military and there is no reason to suspect it could not happen within that institution. Judicial councils throughout Canada, often including lay representation, are specifically designed to address such issues and their involvement is in no way understood to compromise judicial independence.

Currently there is no independent review body in the military that could address this kind of misconduct in the exercise of the adjudicative function. There is no military judicial council. While there is provision for appointing an Inquiry Committee in the Queen's Regulations and Orders, Chapter 101, article 101.13, that Committee acts only in response to requests from the Minister (101.14) and only where the issue relates to the possible removal of a judge from office (101.14). Unlike civilian judicial councils, the Inquiry Committee does not receive public complaints. Moreover, the Inquiry Committee deals only with the conduct of military judges and not other members of military tribunals carrying on judicial functions. While there are other general oversight committees established by the Judge Advocate General (including the "Military Justice Stakeholders Committee," "The Canadian Services Code of Service Discipline Committee," "the JAG Advisory Panel on Military Justice"and the "Military Justice Roundtable Group"), none are responsible for misconduct by adjudicators. These committees deal only with broad issues of policy, do not receive specific complaints, do not have the kind of investigatory powers possessed by the Ombudsman, do not report publicly and do not make recommendations. The Ombudsman could therefore perform an important gap-filling function. The Office of the Ombudsman could assist in addressing problems relating to judicial conduct and practice where that conduct or practice falls short of requiring a Ministerially directed inquiry into the possibility of removal of the judge. The Ombudsman could inquire, resolve, and if necessary, make recommendations, without commenting on the merits of a particular adjudication and without, in any way, interfering with the independence of the tribunal.

In fact, the Office of the Ombudsman will often be ideally situated to achieve the most favourable resolution of such problems. In the example cited, mediation could result in the judge informally acknowledging that the conduct was inappropriate, possibly with an expression of regret to the complainant. The complainant would be personally satisfied that the judge understands why she was offended. The Military, as an institution, will have provided an effective response and the judge will be more sensitive in future cases. This is a "win-win-win" situation.

Unfortunately, the combination Ministerial Directive 8(a) and 10, deprive the Office of the Ombudsman the latitude needed to address potential problems relating to the operation of the military justice system, even in cases where the Ombudsman could provide assistance without in any way interfering with the integrity of judicial decisions or with judicial independence. This is because Ministerial Directive 8(a) is worded more broadly than it has to be to accomplish its reasonable

objective of avoiding this mischief. It is not confined to proscribing interference with adjudicated decisions or independence but uses the vague and broader term, the "exercise of the judicial function." Moreover, although contextual interpretation might arguably solve the problem, the reference to "military tribunals" comes after that phrase. This unfortunate drafting suggests that the Office of the Ombudsman cannot inquire into the operation of military tribunals even when they are not "exercising their judicial functions."

The overly broad reach of Ministerial Directive 8(a) is exacerbated by the aggressive strictures imposed by Ministerial Directive 10, again, strictures that go farther than necessary to avoid the mischief they are addressed at. For example, the word "abuse" conjures up notions of the prejudicial misuse of existing procedures. Is there "abuse," for example, when a standard practice relating to the administration of the court or tribunal is followed? Arguably not, regardless of how deleterious that practice may be in protecting the interests of DND/CF members.[2]

The Office of the Ombudsman has already experienced difficulty as a result of the breadth of Ministerial Directive 8(a) and Ministerial Directive 10. On 31 August 1999 this Office received a letter from a Lieutenant-Commander, Deputy Judge Advocate. The Lieutenant-Commander declined, acting Ministerial Directive 8(a) to provide information with respect to delay in a specific case that was before the Commander of the Canadian Forces Recruiting, Education and Training System with respect to the disposition of charges. The Lieutenant-Commander took the position that he could provide only "information of a general nature" and that the concerns expressed by this Office about delay would be passed on to the appropriate authorities.

Several observations should be made about this. First, in civilian courts the progress of a particular case is a matter of public record. Simple principles relating to open and transparent justice demand that all information relating to the progress of a case be readily available. According to fundamental principles alone, it is unacceptable that the Ombudsman was deprived of information about the progress of a particular case. To the extent that the wording of the Ministerial Directives contributed to this result, it must be amended. Second, the suggestion that the concern of the Ombudsman would be passed on to the appropriate authorities is manifestly inadequate to address the problem of delay. Even under current Ministerial Directive 10, the Ombudsman has the right and responsibility to report complaints of delay to the appropriate authority. If such reports are to be meaningful, the Ombudsman must have details about the delay from the relevant tribunal, unless the Ombudsman is to serve as nothing more than a mere conduit for the information that is provided by a complainant. Third and most important, nothing about inquiring into a delay involves any interference with the legal rulings that a judge or tribunal will be making in the course of that decision.[3] This was not even a case involving Ministerial Directive 8(a), yet its language, already

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2 There are other problems with Ministerial Directive 10 that are discussed below.

3 Subject to section 11(b) of the *Charter*, which would have no application to many dispositions by Military tribunals. Moreover, even in those cases where it could apply, the decision of the trial judge is not into whether the system can deal with complaints more expeditiously. It is into whether the accused person has been prejudiced in a fashion that requires the proceeding to be halted. As such, there would be no inconsistency between a finding by a trial judge in a particular case that section 11(b) had not been violated, and a recommendation by the Ombudsman about how the relevant delay could have been avoided.

broader than it has to be, was interpreted to deny a reasonable request. This case epitomizes the risks associated with provisions like Ministerial Directive 8.

Draft regulation 9(a), reproduced above, is intended to prevent only attempted interference by the Ombudsman in the final disposition of adjudicated verdicts, so that it addresses only the mischief that need be addressed.

Paragraph 8(b)

Paragraph 8(b) provides that the mandate of the Ombudsman does not extend to:

> *b) the exercise of charge laying discretion on the part of the chain of command or the National Investigative Service or the charge preferring discretion of the Director of Military Prosecutions:*

The draft regulations remove this prohibition for the reasons that follow:

It is fully understood that a decision whether to prosecute will often involve a "judgment call" upon which reasonable people can disagree. For this reason, a standard of correctness could not be required of prosecutors, and it would be wrong to have an Ombudsman second-guess the exercise of that discretion. This is undoubtedly the purpose of paragraph 8(b). However, a charge-laying discretion can be abused. The power to decide who will be charged and what charges will be laid can be used to discriminate and to harass. It can be used systemically to stifle opposing views. Legal history is replete with examples. To state some hypothetical examples in the military context, the power can be used *not* to charge senior officers who should be charged, or it can be used *not* to charge in cases of sexual abuse violations. Or it can be used to create scapegoats by charging personnel inappropriately. Quite apart from the need to protect individual rights, there is a significant public interest in ensuring that this considerable power is not abused in such ways. The public interest in non-interference with the operation of the prosecutorial discretion disappears where good faith is not being exercised. This is why the Manitoba Ombudsman has jurisdiction over prosecutorial discretion. Without question, the Office of the Ombudsman DND/CF can play a significant role in protecting against this kind of abuse.

Even where a decision is made in good faith, it may still have negative consequences that this Office might address. Bearing in mind that the function of the Ombudsman is not to assign blame but rather to identify and find solutions to injustice and unfairness, there is a role for this Office to play even when this happens.

Of course, it would be undesirable for the Ombudsman to have the power to prevent the exercise of the charge-laying discretion by those given this responsibility. It is important to note, however, that the Ombudsman does not have the ability to interfere in this way, altogether apart from Ministerial Directive 8(b). The Ombudsman's mediation, fact-finding and reporting functions simply do not permit this Office to impose its will by altering or overruling decisions. That being so, and given the potential abuses of the charge-laying discretion, it is difficult to appreciate the purpose of Ministerial Directive 8(b). The possibility of serious abuse, including systemic abuse is real in this area so there is a legitimate role that the Ombudsman's fact-finding and reporting authority can play in protecting against this.

Given that the Ombudsman cannot interfere directly with the charge laying discretion, apart from unintended over-breadth when Ministerial Directive 8(b) was drafted, there are only three possible explanations for it. Either it exists:

(a) because there are sufficient checks and balances in place, making review by the Ombudsman redundant; or
(b) to insulate charge-laying decisions from review so that abuses are not detected where they occur, or
(c) it is intended to keep reports issued by this Office from having the effect of intimidating prosecutors and the chain of command into exercising their discretion in fashions they consider to be inappropriate.

The first of these possible rationales, that the involvement of the Ombudsman would be redundant, is inaccurate. While there is supervision of charge laying discretion by the Director of Military Prosecutions, that office does not have the independence necessary to perform a review function. Unlike the Ombudsman, the Director of Military Prosecutions is part of the prosecutorial system which could become the subject of a complaint. This fact alone diminishes the credibility of any internal response that may be arrived at. The Ombudsman is much better situated to provide recommendations that are not only impartial, but have the appearance of impartiality. Moreover, what could well be in issue is the decision-making of the Director of Military Prosecutions, in which case the present system leaves no avenue of redress other than to go to the Judge Advocate General. While there is every reason to believe that the Judge Advocate General would respond with the best of intentions, the fact remains that the Judge Advocate General is a member of the military establishment, unlike the Ombudsman. Again, this diminishes the credibility of any response that the Judge Advocate General might make. Review by the independent, arms-length Office of the Ombudsman is in no sense redundant to the problem solving mechanisms currently in place, making rationale (a) above insufficient to sustain Ministerial Directive 8(b).

The second of the possible rationales listed above, namely, the desire to leave potential abuses unchecked, is so palpably unworthy of protection that there is no need to discuss it further. Indeed, this is most certainly not the intent of Ministerial Directive 8(b); it would be unreasonable to ascribe such a nefarious and inappropriate purpose to those who encouraged this limitation.

The third possible rationale for Ministerial Directive 8(b), fear of intimidating those responsible for making charging decisions, can also fairly be disregarded. This Office is a neutral, impartial one, that exercises its authority through moral suasion. If a decision to prosecute or not is indefensible, there should be no reason to prevent the Ombudsman from expressing an opinion on the matter. There is no reason to think that fear of investigation and reporting will have a chilling effect on the proper discharge of this discretion by the professionals charged with making decisions.

It therefore seems that section 8(b) is simply the product of over-breadth and an unsubstantiated fear that the Ombudsman will somehow be dragged into myriad complaints brought by those charged with offences. Since there is a significant, legitimate public interest in maintaining confidence in the charge laying discretion and no compelling reason for this exemption, it should not be perpetuated in the regulations.

Paragraph 8(c)

Ministerial Directive 8(c) provides that the Ombudsman's mandate does not extend to:

> *c) the work of any legal advisors in providing legal advice to DND/CF or their personnel or employees or persons acting as legal counsel in relation to any proceedings*

This provision must be deleted from the regulations.

There are two rationales for Ministerial Directive 8(c). The first is that lawyers are, by tradition, a self-regulating or governing profession. The conduct of lawyers is normally circumscribed by rules of professional conduct established by, and administered by, law societies. The second has to do with the sensitive nature of the lawyer's function. Solicitor-client privilege is essential to the proper discharge of the lawyer's function by protecting confidentiality, that could be compromised if the Ombudsman was to have free access to legal advice.

Regulating Conduct

It is this first rationale, the fact that lawyers are already regulated by Law Societies, that has caused some provinces to deny provincial Ombudsman the authority to investigate the conduct of legal advisors. For example, the *Ombudsman Act* of Alberta provides:

> Nothing in this Act authorizes the Ombudsman to investigate
>
> (2) any decision, recommendation, act or omission of any person as a solicitor for the Crown or acting as counsel for the Crown in relation to any proceedings.

Where complaints are received relating to lawyers, they are referred to the Law Society of Alberta.

Of course, there is no rule of law preventing an ombudsman from reviewing the work of lawyers. In New Brunswick, for example, the Ombudsman can review the work of government lawyers. The non-review of lawyers by independent ombudsmen is therefore clearly based on the perception that someone is already performing that review function, and not on any inherent limitation on having an ombudsman enter this domain.

In the case of DND/CF, permitting the Ombudsman to review the work of lawyers would in no way be redundant.

(a) First, the various law societies across Canada are created by provincial legislation. Technically, they have no legal right to control the conduct of DND/CF lawyers or to compel DND/CF to co-operate in their investigations. Although many federal government lawyers are, in fact, members of provincial law societies, this membership is not required in order to offer legal services to the government of Canada. In substance, DND/CF lawyers are not subject to self-regulation through a governing body the way that lawyers not retained by the Government of Canada are.

(b) Second, to the extent that provincial law societies can influence the conduct of federal lawyers, since DND/CF lawyers belong to different bars across Canada, there is no uniformity of standards and practices.

(c) Third, provincial law societies are concerned mainly with matters of legal ethics and client relations. There are many other issues that can arise relating to the provision of legal services that go beyond the traditional jurisdiction of law societies, which the Ombudsman can address. Law societies are not interested in matters of process, for example, but instead, in the conduct of particular lawyers.

(d) Fourth, law societies respond *only* to complaints, and craft solutions intended to resolve particular problems through the use of their discipline process. The Ombudsman's role and methods are different. The Ombudsman's jurisdiction extends to systemic matters, including matters of process, and his method is to resolve complaints through mediation and ultimately reporting rather than by disciplining members. Unlike law societies, his solutions are cast with systemic considerations in mind.

(e) Law societies exercise jurisdiction over lawyers and students-at-law, meaning those enrolled in bar admissions courses. Currently they have no role to play in regulating para-legals and other employees of lawyers.

It can be seen from all of this, that the first rationale for section 8(c) does not apply in the DND/CF context. The differences between the role of the Ombudsman and the law societies, coupled with the limits in the reach of law society control over DND/CF lawyers and other legal advisers, belie any suggestion of redundancy. There is clearly a crucial role for the Ombudsman in this area that is not being filled adequately at present.

Solicitor-Client Privilege

The second rationale for section 8(c) is the preservation of solicitor-client privilege. It is settled law that the solicitor-client privilege may extend to advice provided by government lawyers to department employees.[4] By extension, the solicitor-client privilege should apply, as well, to communications between DND/CF legal advisers and their "clients." It is an important protection, necessary to the availability of effective legal advice. It would be unacceptable, for example, if a member were to seek legal advice on his obligations to discuss matters with the Ombudsman, and the Ombudsman were then to have access to the information shared between lawyer and client at that meeting.

In understanding the legitimate scope of a provision such as Ministerial Directive 8(c), it is important, however, to understand the reach of solicitor-client privilege. A definition that reflects the law in Canada is furnished by Wigmore, the great evidence scholar, in a passage that has been adopted by the Supreme Court of Canada:

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[4] *R v Campbell and Shirose* [1999] 1 S.C.R. 565.

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or the legal adviser, (8) except the protection be waived.[5]

The key factors worth noting with respect to Ministerial Directive 8(c) are that:

- what is protected are communications between the solicitor and client (and the solicitor and experts) that are made within the confidential framework of their discussion while the client is seeking legal advice, and

- the privilege belongs to the client, who may waive it.

The first, relevant limitation, then, is that a communication not created for the purpose of solicitor-client advice is not protected. For this reason it is not possible for a lawyer to receive documents belonging to a client that were not privileged when created, and then claim that those documents are henceforth sheltered by the solicitor-client privilege. In the military context this would mean that pre-existing documents collected by a military lawyer while preparing a case or giving advice are not privileged. By contrast, solicitor-client correspondence may be protected, depending on their nature.

The second, relevant limitation relates to waiver. Even where a privilege does attach to documents or information, the fact that the privilege belongs to the client means that the client can choose to waive, or dispense with *his or her* privilege. The privilege does not belong to the lawyer. It is the right of the client. If a member is sexually harassed, for example, by a DND/CF lawyer and wants to complain about it, there is nothing in the law of solicitor-client privilege that can shelter the lawyer's conduct from her complaint. Indeed, the Law Society of Upper Canada has recently appointed a Discrimination and Sexual Harassment Counsel without any reservations about the impact of the work of that office on the solicitor-client privilege. Similarly, if a client simply does not wish to assert a privilege for whatever reason, there is no legal basis for the lawyer to resist disclosure. It follows that if a member goes to the Ombudsman for assistance and then waives their solicitor-client privilege, it cannot be used as a justification for protecting that information from disclosure.

It is also important to note that waiver of solicitor-client privilege need not be expressed. It can be implied. In a recent Supreme Court of Canada decision,[6] for example, the accused alleged that the RCMP acted improperly in conducting a particular kind of investigation. The RCMP was taken to have waived solicitor-client privilege when it sought to defend its decision by stating that it had obtained legal advice to the effect its conduct was legal. The Court held that the Crown cannot, at once, rely on legal advice to justify its actions and then claim that it is privileged.

For this reason, few ombudsmen experience difficulty in gaining access to legal opinions relied on by the government actors whose conduct they are investigating. For example, we have

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5 *Descouteaux v Mierzwinski* (1982), 70 C.C.C. (2d) 385 at 398 (S.C.C.).

6 *Campbell and Shirose*, [1999] 1 S.C.R. 565.

been advised that in Alberta, when the Ombudsman wants to see a legal opinion relied on by someone in making a decision, that legal opinion is provided. The legal opinion given to a decision maker constitutes evidence of the basis for the decision, and the Ombudsman therefore reviews it to determine whether the advice claimed was obtained or not, whether it was followed or ignored, and the merit of the opinion. By the same token, the British Columbia Ombudsman has established a protocol with the Attorney General for access to such reports.[7]

Thus, in summary, paragraph 8(c) is modeled on provisions intended to recognize that lawyers are self-regulating, and to protect the legitimate reach of solicitor-client privilege. Given the fact that there is no law society with complete and effective jurisdiction over DND/CF lawyers, and the limits of the solicitor-client privilege, paragraph 8(c) is seriously flawed. It removes from review the work of lawyers and those working with lawyers even though review by the Ombudsman would not be redundant. Moreover, as worded, it is broader than the privilege, needlessly denying access to important information. It extends to "*the work* of any legal advisors in providing legal advice to DND/CF or their personnel or employees..."

As it stands, the provision does not so much protect a privilege as it crafts out an idiosyncratic zone of immunity from investigation for lawyers. Surely it is not intended to privilege lawyers by exempting them in a way that other DND/CF professionals including doctors, engineers, teachers and non-legal officers are not. Why should they, as a matter of policy or public interest, be free from the kind of investigations that the Ombudsman may conduct in the public interest with respect to others within the DND/CF. While DND/CF lawyers have a legitimate interest in protecting their oath of confidence, there is no basis for conferring a preferred status on legal advisers. There is a strong public interest in encouraging this kind of review to ensure that the conduct of legal advisers is not improper and does not unjustly impede the investigation of complaints.

Even if there had been effective law society jurisdiction over all DND/CF lawyers and therefore no need to have the Ombudsman review their conduct, paragraph 8(c) is still inappropriate because of its potential to shield information from the Ombudsman that is needed with respect to other investigations. The confidentiality of solicitor-client relationships is already protected by Schedule I. There is no need to add to this by defining a zone of prohibited review relating to "persons acting as legal counsel in relation to any proceedings."

Finally, paragraph 8(c) creates the anomalous situation that the Ombudsman may be denied access to evidence that would be compellable in courts and tribunals. Consider, for example, the experience that this office had with the *Special Report: Complaint of Inappropriate Comment During an Ongoing CFNIS Investigation and Failure by the Chain of Command to Protect the Integrity of the Investigation* (hereinafter *Noyes* investigation).

Warrant Officer Danny Noyes made a public statement relating to an ongoing Canadian Forces National Investigation Service investigation. The statement was permitted by the chain of command. A complaint was received by this office about the statement and the way it was made. During the ensuing investigation, Public Affairs Officer Lt. Jason Proulx advised an investigator

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7 B.C. Ombudsman, *Investigative Policies and Procedures* 5.5.6.2, and see Ombudsbulletin #23, 28 January 1997 (revised 4 March 1997).

from this office that he had spoken to AJAG's office and had received certain advice about the legality of Warrant Officer Noyes statement. In particular, Lt. Proulx advised the investigator that he was told by Lt. Col. Holland that he (Lt. Col. Holland) would check with the chain of command. Ultimately he was advised by Lt. Col. Holland that "they had agreed we should go ahead with this ... because we wanted to be seen as being open and impartial..." When contacted by this office, Lt. Col. Holland said that he was not going to leave Lt. Proulx "out to dry" and related that he had advised Lt. Proulx that there was a "non-prohibition" on members speaking to the media. He declined to go beyond this by confirming whether he had consulted further up his chain of command, and if so, with whom. He told the investigator that "[he was] not going to get into the mechanics of how we operate." By letter dated 22 November 1999, Captain W.A. Reed, Deputy Judge Advocate General/Operations declined to provide further information, supporting the position taken by Lt. Col. Holland. Captain Reed justified that decision by relying on "solicitor-client privilege" and by citing paragraph 8(c) of the *Ministerial Directives*, that "The Ombudsman's mandate does not extend to the review of ... the work of any legal advisors in providing legal advice to DND/CF or their personnel...."

It can readily be seen that this position impeded the ability of the Ombudsman to discover the relevant facts. This was not done for good reason. This information was not, in fact, privileged. Once Lt. Proulx relied on the legal advice obtained to explain his conduct, the privilege he may have had was lost according to basic principles of waiver as applied in *Campbell and Shirose*. He cannot at once rely on that advice to explain his decision and then attempt to shield the investigator from that advice, nor can his legal adviser be in a better position. Second, the detail provided by Lt. Proulx would constitute a waiver of that advice simply on the principle that he, as the holder of the privilege, was not attempting to assert that principle but rather chose to share the information with the person making the inquiry. Third, depending on whom Lt. Col. Holland checked with in the chain of command, the information may not have been privileged in the first place. If Lt. Col. Holland spoke to persons who were not lawyers and who were not providing legal service, the advice he provided was not protected by solicitor-client privilege. A person cannot at once share a communication with others outside of the solicitor-client relationship and then, at the same time, claim that the information is sheltered by that privilege. Fourth and most importantly, section 8(c) should have had nothing to do with this matter. The investigation was not into the work of the lawyers. It was into the circumstances surrounding the making of the public statement by Warrant Officer Noyes. This is the kind of information other Ombudsmen receive routinely.

This case provides a dramatic example of why paragraph 8(c) must be removed when the Ministerial Directives are put in regulation form. It was used, along with improper reliance on solicitor-client privilege to deny access to important information. An Ombudsman cannot effectively resolve questions relating to the fairness of decisions if the criteria on which those decisions are based remains inaccessible. Moreover, to the extent that section 8(c) is intended to preserve confidences, it is redundant. Schedule 1 already protects legitimate claims to solicitor-client privilege. Finally, to the extent it is intended to recognize that solicitors are a self-governing profession, it is misplaced given that there is no statutory body responsible for governing the conduct of DND/CF lawyers. Section 8(c) must be removed in its entirety or it will continue to obstruct the proper discharge of the function of the Ombudsman and it will pointlessly carve out a zone of protection for lawyers that is not enjoyed by other members of DND/CF.

Other Section 8 Exemptions

There are no comments that need to be made on the remaining provisions in section 8, namely:

> *f) matters relating to civilian employees which are the exclusive jurisdiction of Treasury Board as the employer and bargaining agents, pursuant to the Public Service Staff Relations Act; or*
>
> *g) any other matter which arose before June 15, 1998, unless the Minister is of the opinion that it would be in the public interest, including the interest of members of DND/CF as a whole, for the Ombudsman to deal with the matter.*

The related draft regulations are as follows:

> ***9**. The Ombudsman shall not deal with any matter that requires the Ombudsman to make a review of*
>
> *(a) matters relating to civilian employees that are the exclusive jurisdiction of the Treasury Board as the employer and bargaining agent, pursuant to the Public Service Staff Relations Act; or*
>
> *(b) a matter that arose before June 15, 1998, unless the Minister is of the opinion that it would be in the public interest, including the interest of personnel or members of the DND or CF as a whole, for the Ombudsman to deal with the matter.*

Communications Security Establishment Commissioner

The Office of the Ombudsman has been approached with possible amendments to the Ministerial Directives relating to the work of the Communications Security Establishment Commissioner. Specifically, it has been proposed by Counsel - Directorate of Law/Advisory Office of DND/CF Legal Adviser, that Ministerial Directive 8 be amended to exempt from the Ombudsman's review "any activity in support of the Communications Security Establishment's mandate." Moreover, it has been proposed that section 3 of the Ministerial Directives be amended to provide that the Ombudsman "will refer any complaint .... with respect to the mandated activities of the Communications Security Establishment ... to the Communications Security Establishment Commissioner."

Certainly, just as there is no reason for the Ombudsman to become involved in matters that are the subject of judicial decision-making, or which fall within the jurisdiction of Treasury Board as the employer and bargaining agent of the employer, matters falling within the jurisdiction of the Communications Security Establishment Commissioner should not be the subject of complaints to the Ombudsman. On the other hand, it would be equally inappropriate for the Ombudsman to have no jurisdiction over those matters connected to the Communications Security Establishment, which do not fall within the Commissioner's mandate. This Office has already received complaints from persons working within the Communications Security Establishment. It would be wrong to deprive

such persons of access to the Ombudsman when it is enjoyed by other members of DND/CF. A blanket exemption for all matters "with respect to the mandated activities of the Communications Security Establishment" would be over-broad and unjustifiable.

Moreover, it is undesirable to include a provision in the regulations that requires the Ombudsman to refer matters respecting the activities of the Communications Security Establishment to the Commissioner. Such a provision would compromise the principle of confidentiality. A complainant may wish to discuss a matter with the Office of the Ombudsman, but not wish to pursue that matter if it turns out that the Ombudsman is not the appropriate agency. This has already happened. Part of the mandate of the Ombudsman is to act as referral agent, and in keeping with that duty, the Office of the Ombudsman will advise individuals who can enjoy access to the Commissioner of that entitlement. It is inappropriate, however, to impose an obligation on the Ombudsman to inform the Commissioner of a matter that the complainant does not want to pursue before the Commissioner.

In keeping with these concerns, the following draft regulation has been prepared:

9. The Ombudsman shall not deal with any matter that requires the Ombudsman to make a review of

(c) a matter that falls within the investigative authority of the Communications Security Establishment Commissioner.

(ii) Ministerial Directive 9

Ministerial Directive 9 provides:

9 ***The Ombudsman's office will not investigate any allegation of criminal activity.***

If at any time during the course of his/her dealings with a matter, the Ombudsman is of the opinion that there is evidence of a criminal act or a breach of the Code of Service Discipline on the part of any DND/CF member or personnel, he/she may report the matter to the Canadian Forces Provost Marshal (CFPM).

If at any time during the course of his/her dealings with a matter, the Ombudsman is of the opinion that there is evidence of a criminal act on the part of any person who is not subject to the Code of Service Discipline, he/she may report the matter to the appropriate authority.

Where the Ombudsman intends to investigate any matter, where there is an ongoing Military Police investigation into an alleged criminal or Code of Service Discipline offence, the CFPM or his/her delegate will have priority in the interviewing of witnesses.

This Ministerial Directive is too broad and must be amended. The relevant draft regulations are as follows:

10. If at any time during the course of dealing with a matter, the Ombudsman is of the opinion that there is evidence of

> *(a) a criminal act or a breach of the Code of Service Discipline committed by any member or employee of the DND or CF, the Ombudsman may report the matter to the CFPM; or*
>
> *(b) a criminal act committed by a person who is not subject to the Code of Service Discipline, the Ombudsman may report the matter to the appropriate authority.*

11. If the Ombudsman intends to investigate a matter in respect of which there is an ongoing Military Police investigation into an alleged criminal or Code of Service Discipline offence,

> *(a) the CFPM or his or her delegate shall have priority in the interviewing of witnesses; and*
>
> *(b) the Military Police shall, on the request of the Ombudsman, provide the Ombudsman with copies of documents and information relating to the investigation carried out by the Military Police in connection with the matter.*

Ministerial Directive 9 is intended to prevent the Ombudsman's investigation from interfering with criminal investigations that are being conducted within DND/CF. This is sensible. It is important that the military justice system be permitted to operate without bodies or agencies potentially prejudicing ongoing investigations by taking control of evidence or interfering with the strategic approach by investigators with key witnesses. Ministerial Directive 9 is, however, poorly designed and should be amended. This is because the prohibition in the first paragraph is defined by reference to the target "activity." Defining the prohibition with the phrase "criminal activity" is dangerously broad. For example, the destruction of military records by the military can be characterized as "criminal activity." Sexual abuse can be criminal. Interference in the administration of military justice by the chain of command, were it to occur, could be obstruction of justice and therefore criminal. If the Ombudsman were to lose jurisdiction every time the subject matter of a complaint was an activity that potentially could be characterized as "criminal," the Office would lose its ability to assist in the resolution of many problems that could be resolved satisfactorily using mediation or the political persuasion inherent in the reporting power. Moreover, given that the criminal law addresses the most serious wrongs, on its face this provision would confine the jurisdiction of the Ombudsman to less serious matters.

It is apparent from reading the balance of Ministerial Directive 9 that this is not what was intended by the provision. The last paragraph specifically contemplates the Ombudsman investigating the same matters that the Military Police are investigating – "Where the Ombudsman intends to investigate any matter where there is ... an alleged criminal or Code of Service Discipline Offence..." Given this, the first paragraph cannot mean what it appears to say. To prevent

confusion, it should be removed. The last paragraph deals adequately with the mischief that is being addressed and is all that is required.

Having said this, the last paragraph should also provide that the Ombudsman shall have access to interviews conducted by the Military Police. Where the Ombudsman is to give way to the priority of the Military Police, the Office may well be deprived of relevant data in some cases unless access is granted. This section should provide expressly for a right of access by the Ombudsman to the fruits of a police investigation relating to a matter the Ombudsman is investigating. These changes have been incorporated into draft regulations 10 and 11, reproduced above.

(iii) Ministerial Directive 10

Ministerial Directive 10 provides:

> *10* ***Notwithstanding directives #7 and #8, the Ombudsman may report complaints of abuse or delay related to the administration of the Code of Service Discipline to the appropriate authority, including the CDS, the JAG, the CFPM or the MPCC. The authority should in turn apprise the Ombudsman of any steps taken to remedy any abuse or delay.***
>
> ***Notwithstanding directives #7 and #8****, the Ombudsman may report complaints of abuse or delay related to the administration of the public service discipline process, including the Civilian Personnel Administrative Orders (CPAOs), to the appropriate authority, including the DM.* ***The authority should in turn apprise the Ombudsman of any steps taken to remedy any abuse or delay.***

There is no corresponding draft regulation. This Ministerial Directive should simply be removed.

The view has already been expressed above that Ministerial Directive 10 is too narrow in defining those areas relating to the operation of the administration of the Code of Service Discipline that can be investigated. As indicated, so long as the Ombudsman does not call the finality of any decisions into question by offering opinions on the outcome of particular cases or the legal integrity of adjudicated decisions, there is a role for the Ombudsman to play in the proper administration of justice that goes beyond "delay" and complaints of "abuse." The same holds true with the public service discipline process. So long as the Ombudsman is not investigating the correctness of decisions rendered within that process, the Ombudsman could perform a valuable and legitimate role in ensuring that the process is operating fairly and effectively, as well as without abuse or delay.

Even with respect to "abuse" and "delay," the two areas where the involvement of the Ombudsman is contemplated, Ministerial Directive 10 is too anemic to permit the Ombudsman to operate effectively. First, it contemplates the Ombudsman reporting "complaints" to the relevant authority. If the Ombudsman is to act as anything other than a mere conduit or referral service back to the very agency that may be the subject of the complaint, the Ombudsman needs to be able to report "findings." Moreover, in accordance with his general mandate, the Ombudsman must report these findings to the Minister. Finally, this provision contemplates the complaint falling into a black hole from which it never again emerges: "the authority *should* .. apprise the Ombudsman of any

steps taken." If the Ombudsman is going to be in a position to make a contribution in this area, even under the regime described in Ministerial Directive 10, this Office must be informed of any steps taken so he can contribute to the solution by forming a view on their adequacy. The ability of the Ombudsman to learn about what has been done should not depend on the choice of the referral agency.

To deal with these problems, Ministerial Directive 10 should simply be removed. Since the draft regulation derived from Ministerial Directive 8 has been reworded so that it is not unduly broad, a regulation reflecting Ministerial Directive 10 is not required. Its continued existence only diminishes the role that the Ombudsman could otherwise play in facilitating solutions to problems within the military.

The protocol for investigations within deployed units – Ministerial Directives 15-18

Draft Regulations

Draft regulations dealing with investigations within deployed units are as follows:

18. *(1) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in international operations, the Ombudsman shall normally*

(a) inform the contingent commander prior to the commencement of the investigation;

(b) keep the contingent commander or the commander's designate informed about the progress of the investigation;

(c) request from the contingent commander or the commander's designate that a liaison person be assigned to represent the contingent commander and provide advice to the Ombudsman on any impact the investigation may have on the operational mission;

(d) carry out the investigation while being sensitive to the need to minimize the impact on the operational effectiveness of the contingent; and

(e) where appropriate, seek the advice of the contingent commander or the commander's designate concerning the matter referred to in paragraph (d).

(2) Visits by the Ombudsman to an operational theatre shall occur only where there is a serious and urgent need having regard to the necessity to protect the safety and security of the personnel deployed.

(3) The determination of the serious and urgent need under subsection (2) shall be made by the CDS by weighing the competing priorities, including the need to support the Ombudsman's activities, the need to avoid impacting on operational priorities and the need to protect the safety of all personnel.

(4) Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but notwithstanding that aim, must be completed in a credible, responsive, independent and professional manner.

(5) If the matter of the Ombudsman being effectively able to carry out an investigation without impeding the operational mission of a contingent commander cannot be resolved to the satisfaction of the Ombudsman and the contingent commander, the contingent commander shall refer the matter to the CDS for direction.

(6) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in domestic operations, subsections (1) to (5) also apply in respect of the investigation but a reference to a commander in any of those provisions shall be read as a reference to the joint force commander.

Ministerial Directives

Ministerial Directives 15, 16, 17 and 18 provide a protocol to be used for the conduct of investigations within deployed units. They provide as follows, and reflect, subject to the exigencies of drafting, the same content as the preceding draft regulation..

15. International Operations

Ombudsman staff who intend to investigate a matter within a deployed unit will:

Normally keep the contingent commander informed as it pertains to Ombudsman investigations.

Conduct investigations in full compliance with these directives, while being sensitive to the need to minimize the impact on operational effectiveness. Advice from the Contingent Commander or his designate may be sought on this matter.

Visits to an operational theatre will only occur where there is a serious and urgent need, in light of the necessity to protect the safety and security of men and women so deployed. Such a determination will be made by the CDS by weighing the competing priorities, including the need to support the Ombudsman's activities, the need to avoid impacting on operational priorities, and the need to protect the safety of all personnel.

16. Ombudsman investigations must not and will not impede the operational mission of Commanders. Notwithstanding the aforementioned, investigations must be completed in a credible, responsive, and independent and professional manner.

17. Ombudsman staff, who are deployed into operational theatres to conduct specific investigations, will normally:

a. brief the Contingent Commander directly or through his designate of the

purpose of the investigation;

b. request from the Contingent Commander or his designate, a liaison person who will represent the Contingent Commander and can provide advice on any impact the investigation may have on the operational mission;

c. conduct the investigation in full compliance with these directives but be sensitive to the need to minimize the impact on operations; and

d. advise the Ombudsman of any problems concerning operational effectiveness, who will in turn attempt to find an acceptable solution. If a solution cannot be identified the Ombudsman will communicate with the Contingent Commander on the matter.

Where the matter is not resolved to the satisfaction of the Contingent Commander, he or she will refer the matter to the Chief of Defence Staff for direction.

18. When Ombudsman staff are conducting an investigation within a unit deployed in domestic operations, the same process detailed in directives 15, 16 and 17 will remain with the exception that the Commander involved will be the Joint Force Commander.

Commentary

As indicated, Ministerial Directives 15-18 are satisfactory.

Describing the mode of acquiring co-operation - Ministerial Directives 11-14.

Ministerial Directives 11-14 define the investigative powers of the Ombudsman. They provide as follows:

*11. **The CDS and DM will issue an appropriate Defence Administrative Order and Directive (DAOD) to ensure that all personnel and members of DND/CF shall cooperate fully with the Ombudsman or his/her delegate. At a minimum the DAOD will contain the provisions in Schedule III.***

Access to any document, record or personnel by the Ombudsman or his/her delegate, will be subject only to those legislative provisions and privileges outlined in schedule I to these directives.

Documents, records and information received by the Ombudsman or his/her delegate will be treated in a manner consistent with those legislative provisions and privileges outlined in schedule II to these directives.

12. *Where, in the opinion of the Ombudsman, any DND/CF member or personnel has failed to cooperate with the Ombudsman or his/her delegate or has acted in a fashion so as to mislead, obstruct or hinder the Ombudsman or his/her delegate in their dealings in any matter, the Ombudsman will report the matter to the appropriate authority,* ***including the CDS, DM or the CFPM and may make recommendations. The authority should in turn advise the Ombudsman of what steps have been taken in response to his/her report.***

13. *No adverse action or adverse consequence shall be visited upon any person as retribution or reprisal for bringing a complaint forward to or for lawfully cooperating with the Ombudsman, or any member of his/her staff, in accordance with these directives.*

14. *Where* ***an alleged act of retribution or reprisal has been committed by any DND/CF member or personnel, the Ombudsman may investigate the matter and he/she will report the matter to the appropriate authority including the CDS, DM or the CFPM and he/she may make recommendations. The authority should in turn inform the Ombudsman of any steps taken in response to his/her recommendations.***

General Commentary on Investigation

The Office of the Ombudsman cannot perform its function without the ability to conduct thorough, independent investigations. Intelligent solutions depend on full and accurate information. At the same time, in order to maintain credibility, the investigative powers of the Ombudsman cannot be dependent solely on the good faith of those within the institution he is responsible for scrutinizing. In broad strokes, the current Ministerial Directives cover the correct ground and provide a solid framework for the impending regulation. They include provisions:

- protecting complainants and witnesses from adverse consequences (Ministerial Directive 13)
- proscribing obstruction, refusal to comply or discrimination against complainants and witnesses (Schedule III)
- defining co-operation as extending to access to personnel and facilities and the provision of information and copies of documents and other things (Schedule III)
- requiring that co-operation be prompt ("as soon as reasonable in the circumstances..." (Schedule III)
- proscribing public statements which are intended or likely to compromise or prejudice a review or an investigation from being carried out (Schedule III)

Notwithstanding this framework, some modification to the Ministerial Directives is required, in order to encourage co-operation to ensure timely and thorough investigations.

Solution #1 - Put the Provisions of Schedule III directly into a Regulation

Since Ministerial Directives do not have the force of law, it was necessary to bind DND personnel and CF members to co-operate with the Ombudsman through a Defence Administrative Order and Directive (DAOD). Provision was made for such a DAOD in Ministerial Directive 11. However since this DAOD is a separate instrument issued by the Chief of Defence Staff (CDS) and the Deputy Minister (DM), the actual order is incorporated into the Ministerial Directives as Schedule III.

While this was appropriate in the absence of a regulation or statute, the ease with which a DAOD can be revoked, and the fact that it is an *internal* directive to which the Ombudsman is an outsider, sends the wrong message to those who need access to this Office. Recording the relevant powers directly in a regulation, a public document having the force of law in Canada, is a crucial step in protecting the essential principles of efficacy. The central components of the Ombudsman's function relating to investigation should not simply be incorporated by reference to a DAOD.

Solution #2 - Make the Ombudsman's Power to Encourage Compliance Express

There is nothing in the Ministerial Directives to prevent the Ombudsman from investigating any conduct that interferes with an investigation in any way, or to prevent the Ombudsman from reporting those matters to the Minister or ultimately to the public. Yet there are aspects of the Ministerial Directives as presently drafted that obscure, even threaten these essential powers. These problems are identified in more detail below. The draft regulations remove these ambiguities by making specific the power of the Ombudsman to investigate and report fully on any conduct that interferes in any way with the ability of the Ombudsman to uncover the facts.

The Ombudsman cannot depend on voluntary compliance by those charged with enforcing the provisions of the DAOD. The Office must be provided in the clearest of terms in the Regulations with the legal right to be kept informed of any and all measures taken as the result of complaints relating to interference or obstruction with an investigation so that the Ombudsman can determine whether the response has been adequate. Where the response is not adequate, the Ombudsman must be in a position to report this, and in order to report, must have the facts.

The enforcement provisions contained in current Schedule III state:

Investigations

> *Evidence that this order and directive may have been breached shall be reported to the relevant Commanding Officer or manager who will assess the requirement for further investigation, including a police investigation where necessary.*

Failure to Comply

> *Failure to comply with this order and directive may result in administration or disciplinary action against members of the CF and employees of DND.*

Ministerial Directives 12 and 14 compliments these provisions. They state:

> *12. Where, in the opinion of the Ombudsman, any DND/CF member or personnel has failed to cooperate with the Ombudsman or his/her delegate or has acted in a fashion so as to mislead, obstruct or hinder the Ombudsman or his/her delegate in their dealings in any matter, the Ombudsman will report the matter to the appropriate authority, including the CDS, DM or the CFPM and may make recommendations. The authority should in turn advise the Ombudsman of what steps have been taken in response to his/her report.*
>
> *14. Where an alleged act of retribution or reprisal has been committed by any DND/CF member or personnel, the Ombudsman may investigate the matter and he/she will report the matter to the appropriate authority including the CDS, DM or the CFPM and he/she may make recommendations. The authority should in turn inform the Ombudsman of any steps taken in response to his/her recommendations.*

Together, these provisions mean that:

- the decision to investigate non-co-operation with the directives lies with the Commanding Officer or manager;
- the Ombudsman is given express power to investigate retribution and reprisal or the failure to co-operate, or acts of obstruction by members; and
- the Ombudsman's remedy for non-co-operation, obstruction, or retribution and reprisal is to complain to the CDS, DM or the CFPM, who *may*, but not *must* advise the Ombudsman of what, if anything has been done.
- the enforcement of the provisions designed to secure the ability of the Ombudsman to perform his function is done through proceedings relating to contravention of a DAOD and is dependent on unspecified "disciplinary action."

The following minor but important changes must be made when these investigative provisions are made into regulations:

- those to whom the Ombudsman reports any contravention of provisions in the Regulations relating to his investigative powers, should be *required* rather than simply encouraged to advise the Ombudsman of what has been done, as well as the reasons for that response by those responsible. This would include not only the CDS, DM or CFPM referred to in Ministerial Directives 12 and 14, but also the "Commanding Officer OP Manager" charged with the decision to require further investigation, including by the police, presently spelled out under the heading "Investigations" in the Schedule III to the Ministerial Directives.

- The regulation should provide expressly that the fruits of any investigation conducted into interference with the conduct of the Office of the Ombudsman should be shared with the Ombudsman in their entirety, as well as any decisions made on whether disciplinary action is to be taken.

- The Ombudsman's ultimate power where investigations have been frustrated should be stated expressly, namely, reporting the event to the Minister and/or in a public report.

Solution #3 - Streamline the Powers and Duties Related to Investigation

(i) Ministerial Directive 11

The first paragraph should be removed. As indicated, the provisions now found in Schedule III should be included expressly in the regulations.

(ii) Ministerial Directive 13

The phrase "in accordance with these directives" is either redundant or ambiguous and should be removed. It either means nothing (other than "*As this directive says*, no adverse consequence ...") or it means "*When the Ombudsman is acting in accordance with these directives*, no adverse consequence..." Obviously, if the Ombudsman is not acting in accordance with the directives that would be an acceptable answer to any attempt to sanction non-compliance, but it can be no excuse for "adverse actions and consequences" against complainants and persons who co-operate.

(iii) Ministerial Directives 12 and 14

These clauses should be amended:

- to provide expressly that the appropriate authority to whom the Ombudsman reports

such matter *must* advise him of any steps taken, or the reason for not taking any steps: and

- to acknowledge expressly that the Ombudsman may report to the Minister or the public, using the reporting channels provided for elsewhere in the regulations, on any interference with the Ombudsman's investigations, as well as on any inadequate responses to the Ombudsman's complaints about interference.

(iv) Schedule III

Paragraphs of substance from the Schedule reproduced below, should be amended as indicated.

The General Obligation

Commanders, managers, members and employees at all levels shall facilitate the work of the Ombudsman unless legal requirements or compelling operational or security priorities dictate otherwise.

The exception where "compelling operational or security priorities dictate otherwise" would enable persons to shelter behind spurious claims of operational and security requirements to frustrate proper investigation. Still, no-one can question the importance of preventing interference with the operational needs of the Military, or the protection of national security. The Office of the Ombudsman therefore offers the following compromise.

First, where a refusal occurs on this ground, the matter should be referred to the Minister for his determination or for the decision of his designate. This will discourage frivolous refusals. Moreover, it will provide a mechanism for a more objective assessment of "compelling operational or security priorities" than the present provision appears to contemplate. It cannot be that the final say on this will be with the person who is resisting co-operation.

Second, a mechanism similar to section 37 of the *Canada Evidence Act,* modified to reflect the realities of the Office of the Ombudsman, should be adopted. Section 37 deals with what is known as "public policy immunity," the former "Crown privilege." According to this provision, a person may object to the disclosure on the specified grounds. Where an objection is made, a superior court inquires into the reasons for non-disclosure and, if necessary, orders the inspection of the relevant material. At that hearing, the party seeking production can participate and hear the general reasons, but not inspect the material or inquire into the specifics of the content. If the judge orders inspection, this is done in private by the judge alone. The judge may order part or all of the information to be disclosed.

Requiring a formal reference to a court in matters involving the Ombudsman would defeat the need for expeditious, informal dispute settlement so central to the Office. Therefore, where a party holding material wishes to object to production on the grounds of "compelling operational or

security priorities," the referral should be to the Minister or his delegate.

There is one more variation of the procedure in section 37 that is required. Under section 37, the party seeking production is not entitled to know the contents of the document. They must respond, without full information, to general submissions and claims being made by the Government. Naturally, this diminishes the ability of the party seeking production to question claims of public policy immunity. Unlike section 37, under assurances of confidentiality, the Ombudsman should be entitled to inspect documents over which privilege is claimed *before* the Minister has ruled on their confidentiality. To be clear, this privilege would belong to the Ombudsman alone, and not to other members of the Office of the Ombudsman.

We take this position because we consider the ability of the Ombudsman to inspect the material in question to be important to the proper evaluation and consideration of the confidentiality claim. There is no greater risk in having the Ombudsman inspect confidential documents than there is in permitting judges to do so. Unlike claimants under section 37, who are typically in adversarial positions with the government, the Ombudsman is not in an adversarial relationship with DND/CF. He would have every interest in respecting an undertaking of confidentiality. Moreover, under section 37, anyone may bring a request for disclosure. If inspection by a claimant was permitted, virtually anyone, regardless of trustworthiness, motive or discretion would be given access. The range in personality and trustworthiness of potential claimants would make it irresponsible to assume that they could be trusted with keeping confidences. By contrast, in our case only one person would be inspecting the documents, the Ombudsman himself. Anyone reposed with the confidence necessary to perform the sensitive functions of the Ombudsman must have the trust of the Government. Given this, inspection by the Ombudsman alone of materials over which "compelling operational or security priorities" are asserted, is both appropriate and desirable. It will assist in the correct resolution of any such claims without jeopardizing national security or operational needs.

The Office of the Ombudsman recognizes that where the objection is based on "compelling operational" priorities, the party holding the material or documents may not be able to respond immediately by taking its case to the Minister. In such cases, the obligation on the party objecting to production could be to bring the matter before the Minister at the first reasonable opportunity. The Ombudsman's remedy in the case of unfair delay in bringing the matter forward would be to report on that delay. As well, unreasonable delay will be discouraged because abuse of the ability to delay in the interests of "compelling operational" priorities would be a contravention of the general duty to co-operate.

The draft regulations, reproduced above, establishes the following model:

- where a person believes that there are "compelling operational or security priorities" that will be compromised by providing information to the Ombudsman, the matter is to be referred to the Minister of National Defence or his designate;

- where the claim is made that "compelling operational" priorities would be

unreasonably compromised by an immediate referral to the Minister, the objecting party must bring the objection forward at the first reasonable opportunity;

- the need for suppression must be established by the party resisting production. In order to respond to that claim in a meaningful way, the Ombudsman is given an opportunity to view the documents or hear the information, and then make submissions;

- the Minister of National Defence or his designate may inspect the relevant material;

- after considering the claim to non-disclosure, the Minister of National Defence or his designate may direct that the material be suppressed in its entirety, that it be edited and made available for use by the Ombudsman in part, or that it be disclosed in its entirety, either conditionally or unconditionally. The Ombudsman may not disclose any information that the Minister has declared to be confidential.

The Definition of Co-Operation

According to Schedule III:

> *Co-operation with the Ombudsman extends to:*
>
> - *access to DND/CF personnel and facilities;*
> - *provision of information; and*
> - *provision of copies of documents or other things.*

The wording of this current provision is adequate and we make no recommendations in this regard.

The Obligation of Timely Co-Operation

According to Schedule III:

> *Requests received from the Ombudsman or his delegate shall be fulfilled as soon as is reasonable in the circumstances, including consideration of any legal requirements, or operational or security priorities.*

Again, this provision is adequate, provided it is subject to the same safeguards discussed under the general obligation.

Cases of Non-Compliance

Schedule III provides:

Where a request for information/assistance from the Ombudsman cannot be accommodated, the circumstances are to be reported to the Commander of the Command, Group Principal or senior manager as appropriate.

This is a sensible provision. It should be made express that the Commander of the Command, Group Principal or senior manager should communicate this to the Ombudsman as soon as reasonably possible, along with the reasons why the information cannot be furnished so that non-production can be pursued, if need be.

Consultation

Schedule III provides:

A member or employee who receives a request directly from the Ombudsman may consult his/her Commanding Officer or manager.

Again, we consider this to be a reasonable provision.

Non-Obstruction

Schedule III provides:

Members of the CF and employees of DND shall not without lawful reason wilfully:

- *obstruct, hinder, impede or resist the Ombudsman or his/her delegate in the performance of his/her functions as set out in the Ministerial Directives*
- *refuse or fail to comply with any lawful request of the Ombudsman or his delegate under the Ministerial Directives*
- *make any false statement or attempt to mislead the Ombudsman or his/her delegate in the exercise of his/her function under the Ministerial Directives*
- *make any public statement the intended or probable result of which would be to prejudice a review or an investigation being carried out by the Ombudsman; or*
- *discriminate or retaliate against any person because that person has in good faith:*
    - *made or attempted to make a complaint to the Ombudsman; or*
    - *assisted or otherwise lawfully co-operated in an inquiry by the Ombudsman*

The only change of substance that is required pertains to the fourth bullet, being the provision relating to public comment.

The Provision Relating to Public Comment

Persons must have confidence that they can approach the Ombudsman without fear of adverse consequences. When persons do approach the Ombudsman, the effectiveness of the Office depends on obtaining the true facts from the witnesses who are interviewed. This is particularly difficult given that the Ombudsman will obtain witness statements without oath, without the support of criminal sanction for perjury, and without the benefit of cross-examination. For these reasons, every effort has to be made to ensure that potential witnesses are not subject to intimidation or undue influence.

It is clear that, in an institution like the Military, those in positions of command or authority may easily influence those in subordinate positions. Indeed, the integrity of the military depends on maintaining a power dynamic in which influence and control are the norm. This means that statements made by persons in positions of authority can have the effect of discouraging co-operation and influencing the versions of events the Ombudsman ultimately receives. All of this is recognized, of course, by the provision in Schedule III that provides that members of the CF and employees of the DND shall not:

- *make any public statement the intended or probable result of which would be to prejudice a review or an investigation being carried out by the Ombudsman*

This provision is broad enough *in theory* to address the problem since it proscribes statements intended or likely to prejudice the investigation. It is not broad enough, however, in practice. By confining the prohibition to statements the probable result of which would be to prejudice a review or investigation, the provision requires the speaker to judge the likely effect of the statement. The reality is that those inclined to make public statements that can have a deleterious effect on the Ombudsman's function are unlikely to be in a position to make an objective risk assessment. Moreover, the Ombudsman has an obligation to resolve matters swiftly. There is no reason why requests for information from the press cannot be deferred pending the completion of the Ombudsman's investigation. The interest of those who are involved in, or touched by investigations, to make public statements will in no way be prejudiced by a requirement that they await the outcome of such investigation. Indeed, the public image of those who do ultimately make statements can only be enhanced by delaying those comments until a report is released. There is a natural tendency to want to down-play the seriousness of an event, which can be counter-productive, especially if at the end of the investigation the Ombudsman is put in a position of having to contradict the public statement. Moreover, making premature statements can create the impression of prejudgment or cover-up, and can make it difficult for those involved to mediate effectively. Given all of this, a complete ban is required on public statements relating to any matter the Ombudsman is investigating

To be clear, this in no way interferes with freedom of expression, and there is ample precedent for it, even within the military itself. DAOD 2008-2 entitled "*media relations and public announcements*" provides that members making statements to the media, "Shall respect the principles of operational security, the judicial process with respect to matters before the courts, and Federal laws and policies such as the *Privacy Act* governing the disclosure of information." DND/CF personnel are further instructed that they shall not provide information that "undermine[s] the safety of personnel involved in, or the potential success of, a CF operation." They are not to speculate about events or future policy decisions, offer personal opinion on Government or DND or CF policy, or discuss advice given to the Minister, Cabinet or chain of command. Clearly, there is not complete licence to speak on any matters within the military, nor should there be.

The only issue, then, is whether protecting the integrity of an investigation is reason enough to limit freedom of speech temporarily. It is clear that there are instances within DND/CF where the principle of limiting free speech in the interests of protecting an investigation has been affirmed. The *Noyes* report catalogues some of these instances. In the case of former Warrant Officer Matt Stopford, the Canadian Provost Marshal, after revealing to him aspects of an ongoing investigation, wrote to him imploring him not to make the information public. In a press conference, Inspector Grabb, the lead investigator, declined comment so as not to prejudice the investigation. Indeed, on 3 November 1999 a CANFORGEN was issued providing that before posting information on the Internet, members should ensure that the information "does not harm law enforcement or a lawful investigation." In the *Noyes* case itself, Lt. Proulx, the Public Relations Officer, recognized that public statements can prejudice an investigation. He said:

> "I can completely understand ... how this can impede an investigation because you are shaping opinions or attitudes"

Recognition that public comment can impede an investigation accords with civilian practices. The RCMP prevents members from providing information to the media that compromises "investigational information." The Special Investigations Unit in Ontario, under Regulation 673-98 entitled *Conduct and Duties of Police Officers in Respect of Investigations by the Special Investigations Unit*, promulgated under the *Police Services Act*, provides:

> 12(2) Except as permitted by this Regulation, the police force and members of the police force shall not, during the course of any investigation by the SIU, disclose to any person any information with respect to the incident or the investigation.

Draft Regulations Dealing with Investigation

In order to improve on the problems identified above, the draft regulations relating to investigation provide as follows:

Investigations

13. *(1) If in the Ombudsman's opinion an investigation is necessary to carry out the*

Ombudsman's mandate in connection with a complaint received by the Ombudsman, the Ombudsman shall thoroughly investigate the complaint.

(2) If, in respect of a complaint, the Ombudsman concludes that a formal inquiry, including a Board of Inquiry pursuant to Queen's Regulations and Orders chapter 21, is necessary and appropriate, the Ombudsman may refer the matter to the appropriate authority and the authority shall

(a) following the formal inquiry, inform the Ombudsman of the results of the formal inquiry, including any action taken and refer the matter back to the Ombudsman to be dealt with as the Ombudsman deems appropriate in accordance with these Regulations; or

(b) if a decision is taken that no formal inquiry is to be convened, inform the Ombudsman of that fact and the reasons for the decision.

(3) The Ombudsman shall whenever possible attempt with the full and complete cooperation of all parties, to complete an investigation within 60 days of its commencement.

Cooperation with Ombudsman

***14.** (1) The DND and CF as institutions, and all levels of authority within them, shall provide the Ombudsman, in accordance with the law and consistent with operational and security requirements, with all the support, assistance and cooperation required by the Ombudsman to perform the duties and functions of the Ombudsman.*

(2) Employees and members of the DND and CF shall facilitate the work of the Ombudsman unless legal requirements or compelling operational or security priorities dictate otherwise.

(3) For the purpose of this section, cooperating fully with and facilitating the work of the Ombudsman includes providing, in connection with the Ombudsman's duties and functions,

(a) direct access to the employees and members of the DND and CF and facilities,
(b) information, and
(c) copies of documents or other things,

within a time that is reasonable in the circumstances having regard to any legal requirements or compelling operational or security priorities that dictate otherwise.

(4) If a request for information or assistance from the Ombudsman cannot be accommodated, the person responsible for giving effect to the request shall report the circumstances to the commander of the command, group principal or senior manager as appropriate as soon as is reasonable in the circumstances.

(5) An employee or member of the DND or CF who receives a request for information or assistance directly from the Ombudsman may consult his or her manager or commanding officer within such time as is reasonable in the circumstances so as not to cause undue delay in permitting the duties and functions of the Ombudsman to be exercised in relation to the matter.

(6) No employee or member of the DND or CF shall wilfully and without lawful reason,

(a) refuse or fail to comply with any lawful request of the Ombudsman made in connection with the performance of the Ombudsman's duties and functions;

(b) make any false statement or attempt to mislead the Ombudsman in the performance of the Ombudsman's duties and functions;

(c) fail to forward immediately to the Ombudsman's office, unopened and unread, communications directed to the Ombudsman from any person who

(i) resides on any CF base or is with any Wing or Formation or who is deployed by the CF or is a member of the person's family, or

(ii) is in detention, incarceration or is hospitalized,

or fail to treat communications from the Ombudsman to any such person in the same way;

(d) intercept by electronic or other means communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman;

(e) obtain access to records of the Ombudsman of internal or external communications to or from the Ombudsman;

(f) obtain access to the electronic or other data storage facilities used in connection with the Ombudsman's duties and functions that are separate from the electronic or other data storage system provided to the Ombudsman's offices by the DND or CF;

(g) take steps to breach the confidentiality or privacy of any communication made to or information in the possession of the Ombudsman;

(h) make any public statement relating to any matter that the Ombudsman is investigating; or

(i) discriminate, retaliate or take an adverse action against, or impose an adverse consequence on, any person as retribution or reprisal for bringing in good faith a complaint forward to or lawfully cooperating with the Ombudsman in relation to the Ombudsman's duties and functions.

(7) A person who contravenes subsection (6) shall be considered to have obstructed, impeded or interfered with the Ombudsman in the execution of the duties and functions that the Ombudsman is required to perform.

Where certain disagreement occurs

15. (1) If any person objects to providing information to or otherwise facilitating the work of the Ombudsman on the basis of compelling operational or security priorities referred to in subsections 14(2) and (3), the person shall at the first reasonable opportunity refer the matter together with any material related to the objection to the Minister and advise the Ombudsman of the referral.

(2) Subject to subsection (3), the Minister shall examine the reasons for the objection and any material related to the objection and provide the Ombudsman and the objecting person or the representative of the person with an opportunity to make representations.

(3) An examination by the Minister of material related to the objection shall be carried out in the presence of only the objecting person or representative of the objecting person and the Ombudsman and the Ombudsman shall be entitled to view the material regardless of its security classification.

(4) In subsection (3) "Ombudsman" does not include a representative of or any member of the staff of the Ombudsman's office.

(5) On the conclusion of the examination the Minister shall decide whether the compelling operational or security priorities referred to in subsections 14(2) and (3) exist and on that basis shall direct, as the case requires,

(a) what constitutes a reasonable time for the purposes of subsection 14(3); and

(b) that all, a portion, an edited portion, or no part of the material examined shall be kept confidential.

(6) Information concerning any material that the Minister has directed be kept confidential under subsection (5) shall not be used by the Ombudsman in formulating or rendering any recommendation, opinion or report under these Regulations and shall not be divulged by the Ombudsman to any person, whether the person is a member of the staff of the Ombudsman's office or otherwise.

Failure to cooperate, obstruction, etc., to be reported

16. (1) If, in the opinion of the Ombudsman, any member or employee of the DND or CF has failed to cooperate fully with and facilitate the work of the Ombudsman or has acted in a fashion so as to obstruct, impede or otherwise interfere with the Ombudsman in the execution of the duties and functions that the Ombudsman is required to perform, the Ombudsman shall report the matter to the authority responsible for the employee or member, being the Deputy Minister, CDS, or the CFPM, and the report may contain such recommendations in connection with the matter as the Ombudsman deems necessary.

(2) The authority that receives the report shall advise the Ombudsman of the steps that have been or will be taken in response to the report, including the reasons for taking those steps, or if it is determined that no steps are to be taken, the reasons for that determination.

(3) If an investigation is conducted by any person or body pursuant to a report made by the Ombudsman under this section, the person or body shall, on completion of the investigation, provide the Ombudsman with such information as will enable the Ombudsman to be fully aware of the information obtained during, the conclusions reached at, and the action taken as a result of, the investigation.

Reports of frustration of Ombudsman's duties and functions

17. If, in connection with any investigation, the Ombudsman is of the opinion that the powers of investigation of the Ombudsman have substantially been frustrated and not supported by persons or processes to the extent that the mandate of the Ombudsman cannot be properly exercised in the investigation, the Ombudsman may

(a) make a report of the matter to the Minister; and

(b) publish a report about the matter if the Ombudsman considers that it is in the public interest to do so in order to preserve the respect and cooperation that is to be accorded to the office of the Ombudsman and to prevent occurrences of similar situations.

Deployed unit operations

18. (1) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in international operations, the Ombudsman shall normally

(a) inform the contingent commander prior to the commencement of the investigation;

(b) keep the contingent commander or the commander's designate informed about the progress of the investigation;

(c) request from the contingent commander or the commander's designate that a liaison person be assigned to represent the contingent commander and provide advice to the Ombudsman on any impact the investigation may have on the operational mission;

(d) carry out the investigation while being sensitive to the need to minimize the impact on the operational effectiveness of the contingent; and

(e) where appropriate, seek the advice of the contingent commander or the commander's designate concerning the matter referred to in paragraph (d).

(2) Visits by the Ombudsman to an operational theatre shall occur only where there is a serious and urgent need having regard to the necessity to protect the safety and security of the personnel deployed.

(3) The determination of the serious and urgent need under subsection (2) shall be made by the CDS by weighing the competing priorities, including the need to support the Ombudsman's activities, the need to avoid impacting on operational priorities and the need to protect the safety of all personnel.

(4) Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but notwithstanding that aim, must be completed in a credible, responsive, independent and professional manner.

(5) If the matter of the Ombudsman being effectively able to carry out an investigation without impeding the operational mission of a contingent commander cannot be resolved to the satisfaction of the Ombudsman and the contingent commander, the contingent commander shall refer the matter to the CDS for direction.

(6) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in domestic operations, subsections (1) to (5) also apply in respect of the investigation but a reference to a commander in any of those provisions shall be read as a reference to the joint force commander.

THE REPORTING FUNCTION

Along with the investigative function, the reporting function is critical to the operation of the Office of the Ombudsman. Since the Ombudsman does not have remedial powers, where mediation fails to resolve disputes, reporting is necessary. Where reporting his findings directly to the agency or persons involved does not lead to a satisfactory solution, reporting to the Minister, and ultimately to the public, provide the only real guaranty of public confidence in the integrity of the Office.

The current Ministerial Directives provide:

19 *If on completing his/her review or investigation of any matter, the Ombudsman is of the opinion that:*

a) the matter should be referred to an appropriate authority for further consideration;
b) an omission should be rectified
c) a decision or recommendation should be quashed or substituted
d) any law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed
e) reasons should have been given for a decision or recommendation;
f) a delay should be rectified
g) other steps should be taken to achieve substantial and long-lasting improvements to the welfare of the military community, as listed in paragraph 3 of these directives

the Ombudsman will report his/her recommendations and/or opinions and the reasons therefore, to the appropriate DND/CF authority.

20 *The Ombudsman will report his/her recommendations and/or opinions to the appropriate DND/CF authority. The authority will in turn inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response.*

Where, in the opinion of the Ombudsman, the reasons received from the appropriate DND/CF authority is insufficient or no response is received, the Ombudsman may send a copy of his/her report to the CDS or DM as appropriate. The CDS and DM will in turn inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken, in response. If the CDS or DM are directly involved in the subject matter of the Ombudsman's report, the matter will be reported directly to the MND.

Where in the opinion of the Ombudsman the response received from the CDS or DM is insufficient or no response is received, the Ombudsman may send a copy of his/her report to the MND.

21 *The Ombudsman will in all cases, inform the complainant in the manner and time he/she deems appropriate, as to the disposition of the complaint, including any opinion or recommendation he/she has provided and may make any comments that he/she deems appropriate.*

22 *In compliance with the principles of procedural fairness, where a report will make an adverse comment about any DND/CF member or personnel, the Ombudsman will inform the DND/CF member or personnel of the nature of the intended comment and allow the member or personnel 14 days to submit written respresentations in response. Where the member or personnel cannot respond within 14 days, they may apply to the Ombudsman who will have the discretion to extend the time allowed for representations. The Ombudsman may also in his/her discretion allow oral representations to be made, where in his/her opinion, it is appropriate. The Ombudsman will attach a copy of any such representations to any report made pursuant to paragraph 20 of these directives.*

23 *The Ombudsman:*

1) will investigate any matter upon written direction of the Minister of National Defence;
2) subject to paragraphs 7 and 8 of these directives, may investigate any matter on his/her own motion, after advising the Minister of National Defence;
3) will submit a report annually to the Minister and at any other time he/she considers appropriate;
4) will report to the Minister as he/she considers appropriate on the implementation of any recommendations;
5) will be bound by any general policy directives in relation to his/her office, which are issued by the Minister of National Defence and made public;
6) will wherever possible, attempt with the full and complete co-operation of all parties to complete his/her investigation of any matter within 60 days of invoking his/her mandate; and
7) will keep all involved parties informed of the progress of each case, including any recommendations made and the implementation of such recommendations.

24 *The Minister will make reports submitted by the Ombudsman pursuant to paragraph 23(c) and 23(d) of these directives, public within 60 days of their submission.*

For the most part, these reporting provisions relating to specific complaints are adequate, indeed admirable. Together they provide:

(a) A step-ladder approach to reporting:

- the first level of reporting is to the appropriate DND/CF authority, which will have reasonable time to respond (Ministerial Directive 19)
- the next level of reporting is to those in positions of superiority to the DND/CF authority, without direct Ministerial involvement (Ministerial Directive 20)
- the next level of reporting is the Department of National Defence, if the matter is not resolved (Ministerial Directive 20)

(b) A requirement that the complainant be kept informed (Ministerial Directive 21) and that all interested parties be informed of the progress of any case (Ministerial Directive 23(g))

(c) A provision permitting a right of submissions on the part of individuals who will be the subject of adverse comment (Ministerial Directive 22)

(d) An objective for quick resolution of complaints, (ie, within 60 days) (Ministerial Directive 23(f))

Reporting To the Public

It is the public release of the report and recommendations relating to any investigation that gives the Office of the Ombudsman its credibility and demonstrates its independence, including from the Minister of National Defence. In order for independence and credibility to be preserved, at a minimum, two conditions must obtain. First, the public release of the report must be done by the Ombudsman, not by the Minister. Second, there can be no perception that the Minister has exerted influence over the recommendations. The findings and recommendations released must be, and must be seen to be, those of the Ombudsman.

The current mechanism under the Ministerial Directives for the public release of reports is flawed because it contravenes each of these basic requirements. The relevant provisions in the current Ministerial Directives are:

> *23 The Ombudsman*
>
> *(4) will report to the Minister as he/she considers appropriate on the implementation of any recommendations ...*
>
> *24 The Minister will make all reports submitted by the Ombudsman pursuant to paragraph 23(c) and 23(d) of these directives, public within 60 days of their submission.*

Thus, as currently configured under the Ministerial Directives, the Ombudsman does not report to the public but rather to the Minister. Then it is the Minister who releases the report.

In addition to compromising the appearance of independence of the Ombudsman's Office, these provisions raise a practical problem. The Ministerial Directives provide that the Ombudsman must keep the complainant informed of the investigation and findings. This means that the Ombudsman is placed in the awkward position of having to secure unenforceable promises from complainants that they will not disclose his recommendations until the requisite period has expired. Particularly where a complainant is unhappy with the findings of the investigation, the likelihood of "leaks," including potentially misleading leaks, is high. Sooner or later the Ombudsman will find

himself in a position where he cannot set the record straight fully until the Minister has had the 60 days to review the report. This will not only embarrasse the Office of the Ombudsman, it will diminish the appearance of its independence while the Ombudsman waits for permission of the Minister to respond. Moreover, the Minister may be put in the vulnerable position of having the complainant go public with the matter before the Minister has reviewed it (on his assumption he has sixty days of grace).

At the same time, it is evident that the intent of Ministerial Directive 24 is to provide the Minister with the opportunity to familiarize himself with the report, and to have the time to frame an intelligent response to it. This, too, is a worthy objective. The public release of a report by the Ombudsman will often generate significant publicity. Before this happens, the Minister should be in a position to provide a considered, informed response. It is also in the interests of the efficacy of the report that the Minister have the time to consider it before its public release. If the Minister is put in a position where he or she is pressured to make a statement or response before the report is considered fully, a position may be taken that is inconsistent with the recommendations of the report even where, if studied and reflected on, the report may well have persuaded the Minister to endorse entirely its contents.

Given this, it is appropriate for the Ombudsman to be under an obligation to provide the Minister with reasonable time for study and reflection before the public release. Two things must be clear, however. First, the public release must be done by the Ombudsman, and second, it must be patent that the report is the work of the Ombudsman, unencumbered by interference from the Department. This can be demonstrated through the practice of dating the report on the date it is provided to the Minister rather than on the date of its release, coupled with an endorsement that, consistent with the protocol for the public release of reports, the Minister of Defence is being provided with an advance copy ten working days prior to its public release. In this way, there can be some measure of confidence generated that the report that is ultimately released is the same report that was submitted to the Minister.

Moreover, 60 days is too long. Ten (10) working days is a more reasonable period. This should provide ample time for study and reflection within the Department. On any issue important enough to generate the kind of publicity that would require public statement, the Minister will already have been briefed and all that will remain to consider are the particular findings and solutions proposed by the Ombudsman.

As for the risk of premature disclosure of the findings by complainants or others who have been kept advised of the progress of the investigation, there is no way to remove this risk entirely, short of keeping the report confidential from those persons pending its public release. This would be undesirable. Advising complainants of the findings and recommendations in the report at the time it is being released to the Minister is a good way to demonstrate that the ultimate report has not been influenced by the Minister. Since there is no other reasonable way to prevent breaches of undertakings of confidentiality, the best that we can do is to advise the Ombudsman that if this happens, the Ombudsman should issue a public comment indicating that, as the result of the mandatory requirements of the regulations, he will not release his report until a certain date, and,

obviously, will not comment on it until that time. The risk that the Ombudsman will be put in the position of having to do this will be reduced if the period of delay before public release is reduced. It is more likely that complainants and others informed of the outcome of the report will abide by a 10 day, rather then 60 day period of confidentiality.

The following draft regulations are proposed in relation to the reporting function:

Information about progress and disposition of case

19. *The Ombudsman shall in each case, inform the complainant and other parties involved in the case in such manner and at such time as the Ombudsman deems appropriate, as to the progress of the case and of the disposition of the complaint and provide the complainant and parties with a copy of any opinion or recommendation that the Ombudsman has rendered in connection with the complaint together with such comments as the Ombudsman deems appropriate.*

Adverse comments to be made known to persons to whom they relate

20. *(1) If a report by the Ombudsman under section 21 will contain an adverse comment about any employee or member of the DND or CF, the Ombudsman shall inform the employee or member of the nature of the intended comment and allow the employee or member 14 days to submit representations in response.*

(2) The Ombudsman may, on application by any person who is unable to submit representations pursuant to subsection (1) within the 14 days, extend the person's time for submitting representations.

(3) Representations referred to in subsection (1) shall be in writing unless the Ombudsman, on application, considers it appropriate in the circumstances to allow oral representations to be made.

(4) A copy of all written representations received under this section shall be appended to any report made pursuant to section 21.

Report to be made on completion of investigation

21. *If, on completing an investigation of any matter, the Ombudsman is of the opinion that*

(a) the matter should be referred to an appropriate DND or CF authority for further consideration,

(b) an omission should be rectified,

(c) a decision or recommendation should be quashed or substituted,

(d) a law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed,

(e) reasons should have been given for a decision or recommendation,

(f) a delay should be rectified, or

(g) other steps should be taken to achieve substantial and long-lasting improvements to the welfare of employees and members of the DND or CF,

the Ombudsman shall send a report of the Ombudsman's recommendations and opinions, if any, and the reasons therefore, to the appropriate DND or CF authority.

Response to Ombudsman's report

***22.** (1) An authority that receives a report under section 21 shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to the report.*

(2) If, in the opinion of the Ombudsman, the response to a report received from the appropriate DND or CF authority is insufficient or no response is received, the Ombudsman may send a copy the report to the Deputy Minister or CDS as appropriate and in such case the Deputy Minister or CDS shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response.

(3) If, in the opinion of the Ombudsman, the response to a report received from the Deputy Minister or CDS is insufficient or no response is received, the Ombudsman may send a copy of the report to the Minister.

(4) If the Deputy Minister or CDS is directly involved in the subject-matter of the Ombudsman's report, the Ombudsman shall report the matter directly to the Minister instead of sending a copy of the report to the Deputy Minister or CDS as the case may be under subsection (2).

Administrative Matters

Annual and other reports

***23.** (1) The Ombudsman*

(a) shall

(i) annually and at such other times as the Minister may require, submit a report to the Minister on the activities of the Ombudsman, and

(ii) when required by the Minister, submit reports to the Minister on the implementation of any recommendations made by the Ombudsman; and

(b) may, if the Ombudsman considers that it is in the public interest to do so, issue reports concerning any investigation or other matter within the mandate of the Ombudsman.

(2) A report under

(a) paragraph (1)(a) shall be published by the Ombudsman on the expiration of 10 days after it has been submitted to the Minister, or

(b) paragraph (1)(b) shall be submitted by the Ombudsman to the Minister and, if the Ombudsman considers that it is in the public interest to do so, may be published by the Ombudsman on the expiration of 10 days after it has been submitted,

and a report so published shall not be in a form that has been altered at the instance of a person other than the Ombudsman.

CONFIDENTIALITY

Confidentiality is essential to the proper exercise of the Ombudsman's function. Fittingly, a number of the Ministerial Directives deal in paragraphs 25 - 30, with several aspects of confidentiality. Together they include:

- a general confidentiality provision (Ministerial Directives 29 (a) - (c) and (e)) as well as specific provisions imposing duties of confidentiality on the Office of the Ombudsman (Ministerial Directive 26)
- measures designed to ensure delivery of, and secure the confidentiality of, information in the hands of the DND/CF that is on its way to or from the Ombudsman (Ministerial Directives 27 and 28)
- measures designed to protect computer information in the Office of the Ombudsman (Ministerial Directive 30)
- a provision permitting the Ombudsman to establish its own Access to Information and Privacy Co-ordinator to handle all *Access to Information Act* and *Privacy Act* inquiries (Ministerial Directive 25)

They provide as follows:

25 *The Ombudsman's Office will establish its own Access to Information and Privacy Coordinater who will handle all Access to Information Act and Privacy requests received by DND in relation to the Ombudsman's Office and will deal directly with the public and the Offices of the Information and Privacy Commissioners in relation to such requests. The DND Access to Information and Privacy Section and the DND/CF Legal Advisor will provide assistance with such matters, upon request by the Ombudsman's Office.*

26 *All members of the Ombudsman's staff will swear an oath of secrecy.*

27 *Correspondence from any person who resides on any CF Base, Wing or Formation, or who is deployed by the CF (or a member of their family) or who is in detention, incarceration or hospitalization must be forwarded immediately to the Ombudsman's office, unopened and unread. The same treatment will be accorded to any correspondence flowing from the Ombudsman's office to such persons.*

28 *All communications between the Ombudsman and any person will not be covered or counted against any restrictions on that person's right to send letters or other documents or receive or make phone calls.*

29 *Confidentiality and Security*

The office of the Ombudsman will operate in a confidential and secure manner so as to protect the information received by the office in the course of its operations. Except as authorized by law:

1) No communication or information in any form will be disclosed by the Ombudsman or any member of his staff, except where in the opinion of the Ombudsman, it is necessary, in accordance with these directives, including for the purposes of an investigation, or the issuance of a report;

2) All of the communications of the Ombudsman and his/her staff; including those between the Ombudsman and any person, including e-mail, telephone and cellular phone communications, are private and confidential and will not be subject to interception;

3) All records of internal and external communications, including records of internal and external phone calls, e-mails and cellular phone communications to or by the Ombudsman and his/her staff will

not be accessible to anyone outside of the office, including members of the DND/CF;

4) *The Ombudsman's computer system will not be subject to monitoring and its files will not be accessible to anyone outside the Ombudsman's office; and*

5) *No steps shall be taken to breach the confidentiality or privacy of any communication or information made to or in the possession of the Ombudsman's office.*

The Ombudsman will report any such actions to the appropriate authority, including the CDS, the DM or the CFPM and he/she may make recommendations. The authority should in turn inform the Ombudsman of any steps taken in response to such recommendations.

30 *In addition to having access to DND/CF Computer systems, the Ombudsman's office will have a separate computer system, by which any person can access the office. This computer system is subject to the same limits on monitoring and access as are described in paragraph 29(d) above.*

Most of these provisions are suitable and adequate, subject to redrafting to make their wording fitting for regulations. There is one change, similar to others already discussed, that is required. Ministerial Directive 29 provides that where there have been breaches of security, the Ombudsman will report these to the appropriate authority who "should" inform the Ombudsman of any steps taken. Again, the Ombudsman must not be left to depend on the fiat of the responsible authority. The regulations that we have drafted *require* the responsible authority to advise the Ombudsman of the steps taken, and that if none are taken, to explain why.

With respect to Ministerial Directive 25, as indicated in the introduction of this report, the Office of the Ombudsman is strongly of the view that it should be exempted from the *Access to Information Act* and the *Privacy Act*. Yet we recognize that this would require legislation, and at this stage, relevant questions relate to the shape that regulations should take. So long, however, as the Ombudsman is subject to those statutes, it is imperative that the Ombudsman's Office handle its own access to information and privacy inquiries. This is not, however, a matter that is suitable for regulation. The designation of the co-ordinator need not be done in this fashion, and should not. We discuss below how we believe this matter should be handled, under the heading "Miscellaneous Matters."

The following draft regulations are proposed in relation to confidentiality.

Access to documents, etc.

25. *(1) Access to any document, record or personnel by the Ombudsman shall be subject only to the privileges arising under the legislation, policy and privileges referred to in Schedule 1.*

(2) Documents, records and information received by the Ombudsman shall be treated in a manner consistent with the privileges arising under the legislation and policy referred to in Schedule 2.

Correspondence and communications

26. *Communications between the Ombudsman and any person shall not be covered by or counted against any restrictions on that person's right to send letters, documents or correspondence or to receive or make telephone calls.*

Confidentiality and security

27. *(1) The Office of the Ombudsman shall be operated in a confidential and secure manner so as to protect the information received by the office in the course of its operations.*

(2) Except as otherwise authorized by law,

(a) no communication to the Ombudsman or information provided to the Ombudsman in any form shall be disclosed by the Ombudsman, except where it is, in the opinion of the Ombudsman, subject to these Regulations, necessary for an investigation, report or other authorized purpose; and

(b) communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman are private and confidential.

Oath of secrecy

28. *All members of the Ombudsman's staff shall, on appointment, swear an oath of secrecy.*

MISCELLANEOUS MATTERS

Miscellaneous Ministerial Directives

A number of the other Ministerial Directives deal with other issues not canvassed above, but more than mere housekeeping matters. Each requires inclusion in the Regulations. The first is the power of delegation provided for in Ministerial Directive 34. It states:

34 The Ombudsman may delegate as permitted by law, any of his/her powers set out in the Ministerial Directives to any member of his or her staff, except for the power of delegation and the power to issue reports pursuant to paragraphs 23(c) and 23(d)

of the directives.

The second provision is Ministerial Directive 36, providing for the establishment of an Ombudsman's Advisory Committee. It provides:

> 36 *The Ombudsman's office, within one year of commencing operations, will create a DND/CF Ombudsman's Advisory Committee. The advisory committee will meet on a regular basis to provide the Ombudsman with advice on issues within the context of DND/CF and concerns in relation to the operation of the Ombudsman's Office. The representation of this committee will be determined by the Ombudsman based upon a pool of candidates approved by the Minister and having regard to the need to ensure a broad based representation within the constituency.*

A number of other Ministerial Directives should be included in the Regulations. They relate to matters that could undermine the ability of the Office to function properly if not secured by law.

> 32 *The Ombudsman may engage professional or other services, as described in the Administrative Framework for the Office.*
>
> 33 *DND/CF will make personnel available, as requested by the Ombudsman, to provide any specialized knowledge or expertise, to the extent that operational requirements permit.*
>
> 35 *The Ombudsman's Office will be responsible for its own communications and media relations. The Director General Public Affairs will be available to provide communications assistance to the Ombudsman or his/her delegate upon request.*

Miscellaneous Draft Regulations

The following are the draft regulations relating to these and other miscellaneous matters:

Assistance personnel to be made available

> ***29.*** *To the extent that operational requirements permit, the DND and CF shall make personnel available as requested by the Ombudsman in order to provide specialized knowledge or expertise to assist the Ombudsman's activities.*

Delegation of powers, etc.

> ***30.*** *Any of the powers, duties or functions of the Ombudsman under these Regulations, other than the power of delegation and the duty or power of submitting reports pursuant to section 23, may be delegated by the Ombudsman to any member of the Ombudsman's staff.*

Communications and media matters

> ***31.*** *The Ombudsman shall be responsible for the Ombudsman's own communications and media relations and the Director General Public Affairs of the DND shall be available to provide communications assistance to the Ombudsman upon request.*

Engaging advisers

> ***32*** *The Ombudsman may engage such technical and professional advisers as the Ombudsman considers necessary for the proper conduct of the Ombudsman's activities.*

Ombudsman's advisory committee

> ***33.*** *(1) The Ombudsman shall, within 6 months after these Regulations come into force, establish an Ombudsman's Advisory Committee.*
>
> *(2) The representation on the Committee shall be determined by the Ombudsman based on a pool of candidates approved by the Minister having regard to the need to ensure a broad based representation from the DND and CF.*
>
> *(3) The Committee shall meet on a regular basis to provide the Ombudsman with advice on issues within the context of the DND and CF and concerns that have arisen in relation to the activities of the Ombudsman's Office.*

HOUSEKEEPING MATTERS

A few of the Ministerial Directives are unsuitable for regulations. They are not so much suitable propositions of law fit for inclusion in delegated legislation, as administrative matters between the Office of the Ombudsman and the Minister. Some are dated, whereas others remain important. Other than the obsolete matters, these administrative matters should be dealt with in a letter of agreement between this Office and the Minister.

Obsolete Matters

Ministerial Directives 37 and 38 will no longer be relevant once the Ministerial Directives are recorded in regulation form:

> *37* *The Ministerial Directives will be reviewed by the Ombudsman in consultation with the Minister of National Defence and/or his/her delegates, within the first year of operations, to ensure that they are meeting the needs of the office and the DND/CF community, as listed in paragraph 3 of these Directives.*

38 *In any case where the Ombudsman experiences difficulty in fulfilling his/her mandate or is of the opinion that the Ministerial Directives are not being followed by personnel and members of the DND/CF, he/she will report the matter to the Minister of National Defence.*

Matters that Should be Included in a Letter of Understanding

25 *The Ombudsman's Office will establish its own Access to Information and Privacy Coordinater who will handle all Access to Information Act and Privacy requests received by DND in relation to the Ombudsman's office and will deal directly with the public and the Offices of the Information and Privacy Commissioners in relation to such requests. The DND Access to Information and Privacy Section and the DND/CF Legal Advisor will provide assistance with such matters, upon request by the Ombudsman's office.*

30 *In addition to having access to DND/CF Computer systems, the Ombudsman's office will have a separate computer system, by which any person can access the office. This computer system is subject to the same limits on monitoring and access as are described in paragraph 29(d) above.*

31 *The budget for the office of the Ombudsman will be reported as a separate line item in the Department's estimates. The budget will be reported annually in the Ombudsman's annual report.*

APPENDIX I – Draft Regulations

Short title

Short title

1. These Regulations may be cited as the *National Defence/Canadian Forces Ombudsman Regulations*.

Interpretation

Definitions

2. (1) In these Regulations,

"CDS" means the Chief of Defence Staff;

"CF" means the Canadian Forces;

"CFPM" means the Canadian Forces Provost Marshal;

"DND" means the Department of National Defence.

(2) All other words and expressions have the same meanings as in the *National Defence Act*.

(3) A reference in these Regulations to "employee" or "member" in respect of the DND or CF includes a person engaged as personnel of the DND or CF, regardless of the level of the person's position or rank.

(4) Except as otherwise provided or the context otherwise requires, the provisions of these Regulations that apply to or in respect of the Ombudsman apply to or in respect of the representative of the Ombudsman and the staff of the Ombudsman while performing duties or functions on behalf of the Ombudsman.

General

Ombudsman's mandate duties and functions

3. (1) The Ombudsman designated under section 5 of the *National Defence Act* shall, on the Minister's behalf,

(*a*) act as a neutral and objective sounding board, mediator, investigator and reporter on matters related to the DND and CF,

(*b*) act as a direct source of information, referral and education to assist individuals in accessing existing channels of assistance and redress within the DND and CF,

(*c*) serve to contribute to substantial and long-lasting improvements in the welfare of employees and members of the DND and CF community,

and in the performance of those duties and functions, the Ombudsman shall be independent from the management and chain of command of the DND and CF and shall report directly to and be accountable to the Minister.

(2) If a complaint is made to the Ombudsman about the handling of complaints by or under existing mechanisms, including a redress of grievance, the Ombudsman shall review the process to ensure that individuals are treated in a fair and equitable fashion.

Investigations on direction or on own initiative

4. The Ombudsman

(*a*) shall investigate any matter referred to the Ombudsman by written direction of the Minister; and

(*b*) may, subject to these Regulations, on the Ombudsman's own motion after advising the Minister, investigate any matter concerning the DND or CF.

Complaints

5. Any person may bring a complaint to the Ombudsman, directly and free of charge, if the complaint relates to that person's treatment by or dealings with

(*a*) the DND or CF;

(*b*) any employee or member of the DND or CF; or

(*c*) an agent acting on behalf of the DND or CF or personnel of that agent.

Matters Not to be Dealt With

Veterans Affairs matters

6. If, in the opinion of the Ombudsman, the subject-matter of a complaint being considered by the Ombudsman falls within the jurisdiction of Veterans Affairs Canada or the Veterans Review and Appeal Board, the Ombudsman shall not deal with the complaint but may refer the matter to Veterans Affairs Canada and advise the complainant of that action.

Matters not in public interest

7. (1) The Ombudsman may refuse to deal with a complaint or may discontinue dealing with a complaint at any stage if, in the opinion of the Ombudsman, it is in the public interest to do so.

(2) In exercising the discretion under subsection (1), the Ombudsman shall consider the following factors:

(*a*) whether the complaint is frivolous or vexatious;

(*b*) whether the complainant lacks sufficient personal interest in the matter;

(*c*) the age of the complaint;

(*d*) the amount of time between when the complainant became aware of the matters giving rise to the complaint and when the complaint is received by the Ombudsman; and

(*e*) the need for a judicious and efficient use of the Ombudsman's resources.

Where complainant has other remedies

8. (1) Except in circumstances that the Ombudsman considers to be compelling, the Ombudsman shall not deal with a complaint if the complainant has not, within the applicable time limit, first availed himself or herself of one or more of the following existing mechanisms available to the complainant:

(*a*) the CF Redress of Grievance System;

(*b*) the Military Police Complaints Commission;

(*c*) the Public service grievance and complaints system; or

(*d*) the Security Intelligence Review Committee.

(2) For the purpose of paragraph (1)(*c*), the Public service grievance and complaints system includes formal complaints mechanisms and rights of appeal to the Public Service Commission under the *Public Service Employment Act,* rights of grievance and appeal to the Public Service Staff Relations Board and review and appeal procedures in relation to workers compensation under the *Government Employees Compensation Act* and rights of appeal to Management Review Boards of the public service health and dental plans.

Other matters not to be dealt with

9. The Ombudsman shall not deal with any matter that requires the Ombudsman to make a review of

(*a*) judicial decisions of military judges or military tribunals, such as courts martial or summary trial bodies, but nothing shall prevent the Ombudsman from making a review of any matter that relates solely to the efficacy of proceedings before judges or tribunals or the conduct of judges or members of tribunals;

(*b*) matters relating to civilian employees that are the exclusive jurisdiction of the Treasury Board as the employer and bargaining agent, pursuant to the *Public Service Staff Relations Act;*

(c) a matter that falls within the investigative authority of the Communications Security Establishment Commissioner; or

(d) a matter that arose before June 15, 1998, unless the Minister is of the opinion that it would be in the public interest, including the interest of personnel or members of the DND or CF as a whole, for the Ombudsman to deal with the matter.

Criminal and other offence matters

10. If at any time during the course of dealing with a matter, the Ombudsman is of the opinion that there is evidence of

(*a*) a criminal act or a breach of the Code of Service Discipline committed by any employee or member of the DND or CF, the Ombudsman may report the matter to the CFPM; or

(*b*) a criminal act committed by a person who is not subject to the Code of Service Discipline, the Ombudsman may report the matter to the appropriate authority.

Where offence investigation is being carried out

11. If the Ombudsman intends to investigate a matter in respect of which there is an ongoing Military Police investigation into an alleged criminal or Code of Service Discipline offence,

(*a*) the CFPM or his or her delegate shall have priority in the interviewing of witnesses; and

(*b*) the Military Police shall, on the request of the Ombudsman, provide the Ombudsman with copies of documents and information relating to the investigation carried out by the Military Police in connection with the matter.

Investigations and Other Activities

Resolution of problems

12. The Ombudsman shall attempt to resolve problems at the level at which they can most efficiently and effectively be resolved and shall make recommendations to the lowest level of authority that can effect the change considered necessary by the Ombudsman.

Investigations

13. (1) If in the Ombudsman's opinion an investigation is necessary to carry out the Ombudsman's mandate in connection with a complaint received by the Ombudsman, the Ombudsman shall thoroughly investigate the complaint.

(2) If, in respect of a complaint, the Ombudsman concludes that a formal inquiry, including a Board of Inquiry pursuant to Queen's Regulations and Orders chapter 21, is necessary and appropriate, the Ombudsman may refer the matter to the appropriate authority and the convening authority shall

(a) following the formal inquiry, inform the Ombudsman of the results of the inquiry including any action taken; and refer the matter back to the Ombudsman to be dealt with as the Ombudsman deems appropriate in accordance with these Regulations; or

(*b*) if a decision is taken that no formal inquiry is to be convened, inform the Ombudsman of that fact and the reasons for the decision.

3) The Ombudsman shall whenever possible attempt, with the full and complete cooperation of all parties, to complete an investigation within 60 days of its commencement.

Cooperation with Ombudsman

14. (1) The DND and CF as institutions, and all levels of authority within them, shall provide the Ombudsman, in accordance with the law and consistent with operational and security requirements, with all the support, assistance and cooperation required by the Ombudsman to perform the duties and functions of the Ombudsman.

(2) Employees and members of the DND and CF shall facilitate the work of the Ombudsman unless legal requirements or compelling operational or security priorities dictate otherwise.

(3) For the purpose of this section, cooperating fully with and facilitating the work of the Ombudsman includes providing, in connection with the Ombudsman's duties and functions,

(*a*) direct access to the employees and members of the DND and CF and facilities,

(*b*) information, and

(*c*) copies of documents or other things,

within a time that is reasonable in the circumstances having regard to any legal requirements or compelling operational or security priorities that dictate otherwise.

(4) If a request for information or assistance from the Ombudsman cannot be accommodated, the person responsible for giving effect to the request shall report the circumstances to the commander of the command, group principal or senior manager as appropriate as soon as is reasonable in the circumstances.

(5) An employee or member of the DND or CF who receives a request for information or assistance directly from the Ombudsman may consult his or her manager or commanding officer within such time as is reasonable in the circumstances so as not to cause undue delay in permitting the duties and functions of the Ombudsman to be exercised in relation to the matter.

(6) No employee or member of the DND or CF shall wilfully and without lawful reason,

(*a*) refuse or fail to comply with any lawful request of the Ombudsman made in connection with the performance of the Ombudsman's duties and functions;

(*b*) make any false statement or attempt to mislead the Ombudsman in the performance of the Ombudsman's duties and functions;

(*c*) fail to forward immediately to the Ombudsman's office, unopened and unread, communications directed to the Ombudsman from any person who

(i) resides on any CF base or is with any Wing or Formation or who is deployed by the CF or is a member of the person's family, or

(ii) is in detention, incarceration or is hospitalized,

or fail to treat communications from the Ombudsman to any such person in the same way;

(*d*) intercept by electronic or other means communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman;

(*e*) obtain access to records of the Ombudsman of internal or external communications to or from the Ombudsman;

(*f*) obtain access to the electronic or other data storage facilities used in connection with the Ombudsman's duties and functions that are separate from the electronic or other data storage system provided to the Ombudsman's offices by the DND or CF;

(*g*) take steps to breach the confidentiality or privacy of any communication made to or information in the possession of the Ombudsman;

(*h*) make any public statement relating to any matter that the Ombudsman is investigating; or

(*i*) discriminate, retaliate or take an adverse action against, or impose an adverse consequence on, any person as retribution or reprisal for bringing in good faith a complaint forward to or lawfully cooperating with the Ombudsman in relation to the Ombudsman's duties and functions.

(7) A person who contravenes subsection (6) shall be considered to have obstructed, impeded or interfered with the Ombudsman in the execution of the duties and functions that the Ombudsman is required to perform.

Where certain disagreement occurs

15. (1) If any person objects to providing information to or otherwise facilitating the work of the Ombudsman on the basis of compelling operational or security priorities referred to in subsections 14(2) and (3), the person shall at the first reasonable opportunity refer the matter together with any material related to the objection to the Minister and advise the Ombudsman of the referral.

(2) Subject to subsection (3), the Minister shall examine the reasons for the objection and any material related to the objection and provide the Ombudsman and the objecting person or the representative of the person with an opportunity to make representations.

(3) An examination by the Minister of material related to the objection shall be carried out in the presence of only the objecting person or representative of the objecting person and the Ombudsman and the Ombudsman shall be entitled to view the material regardless of its security classification.

(4) In subsection (3) "Ombudsman" does not include a representative of or any member of the staff of the Ombudsman's office.

(5) On the conclusion of the examination the Minister shall decide whether the compelling operational or security priorities referred to in subsections 14(2) and (3) exist and on that basis shall direct, as the case requires,

(*a*) what constitutes a reasonable time for the purposes of subsection 14(3); and

(*b*) that all, a portion, an edited portion, or no part of the material examined shall be kept confidential.

(6) Information concerning any material that the Minister has directed be kept confidential under subsection (5) shall not be used by the Ombudsman in formulating or rendering any recommendation, opinion or report under these Regulations and shall not be divulged by the Ombudsman to any person, whether the person is a member of the staff of the Ombudsman's office or otherwise.

Failure to cooperate, obstruction, etc., to be reported

16. (1) If, in the opinion of the Ombudsman, any employee or member of the DND or CF has failed to cooperate fully with and facilitate the work of the Ombudsman or has acted in a fashion so as to obstruct, impede or otherwise interfere with the Ombudsman in the execution of the duties and functions that the Ombudsman is required to perform, the Ombudsman shall report the matter to the authority responsible for the employee or member, being the Deputy Minister, CDS or the CFPM, and the report may contain such recommendations in connection with the matter as the Ombudsman deems necessary.

(2) The authority that receives the report shall advise the Ombudsman of the steps that have been or will be taken in response to the report, including the reasons for taking those steps, or if it is determined that no steps are to be taken, the reasons for that determination.

(3) If an investigation is conducted by any person or body pursuant to a report made by the Ombudsman under this section, the person or body shall, on completion of the investigation, provide the Ombudsman with such information as will enable the Ombudsman to be fully aware of the information obtained during, the conclusions reached at, and the action taken as a result of, the investigation.

Reports of frustration of Ombudsman's duties and functions

17. If, in connection with any investigation, the Ombudsman is of the opinion that the powers of investigation of the Ombudsman have substantially been frustrated and not supported by persons or processes to the extent that the mandate of the Ombudsman cannot be properly exercised in the investigation, the Ombudsman may

(*a*) make a report of the matter to the Minister; and

(*b*) publish a report about the matter if the Ombudsman considers that it is in the public interest to do so in order to preserve the respect and cooperation that is to be accorded to the office of the Ombudsman and to prevent occurrences of similar situations.

Deployed unit operations

18. (1) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in international operations, the Ombudsman shall normally

(*a*) inform the contingent commander prior to the commencement of the investigation;

(*b*) keep the contingent commander or the commander's designate informed about the progress of the investigation;

(*c*) request from the contingent commander or the commander's designate that a liaison person be assigned to represent the contingent commander and provide advice to the Ombudsman on any impact the investigation may have on the operational mission;

(*d*) carry out the investigation while being sensitive to the need to minimize the impact on the operational effectiveness of the contingent; and

(*e*) where appropriate, seek the advice of the contingent commander or the commander's designate concerning the matter referred to in paragraph (*d*).

(2) Visits by the Ombudsman to an operational theatre shall occur only where there is a serious and urgent need having regard to the necessity to protect the safety and security of the personnel deployed.

(3) The determination of the serious and urgent need under subsection (2) shall be made by the CDS by weighing the competing priorities, including the need to support the Ombudsman's activities, the need to avoid impacting on operational priorities and the need to protect the safety of all personnel.

(4) Investigations by the Ombudsman must not impede the operational mission of contingent commanders, but notwithstanding that aim, must be completed in a credible, responsive, independent and professional manner.

(5) If the matter of the Ombudsman being effectively able to carry out an investigation without impeding the operational mission of a contingent commander cannot be resolved to the satisfaction of the Ombudsman and the contingent commander, the contingent commander shall refer the matter to the CDS for direction.

(6) If the investigation of a matter by the Ombudsman involves a unit that has been deployed in domestic operations, subsections (1) to (5) also apply in respect of the investigation but a reference to a commander in any of those provisions shall be read as a reference to the joint force commander.

Information about progress and disposition of case

19. The Ombudsman shall in each case, inform the complainant and other parties involved in the case in such manner and at such time as the Ombudsman deems appropriate, as to the progress of the case and of the disposition of the complaint and provide the complainant and parties with a copy of any opinion or recommendation that the Ombudsman has rendered in connection with the complaint together with such comments as the Ombudsman deems appropriate.

Adverse comments to be made known to persons to whom they relate

20. (1) If a report by the Ombudsman under section 21 will contain an adverse comment about any employee or member of the DND or CF, the Ombudsman shall inform the employee or member of the nature of the intended comment and allow the employee or member 14 days to submit representations in response.

(2) The Ombudsman may, on application by any person who is unable to submit representations pursuant to subsection (1) within the 14 days, extend the person's time for submitting representations.

(3) Representations referred to in subsection (1) shall be in writing unless the Ombudsman, on application, considers it appropriate in the circumstances to allow oral representations to be made.

(4) A copy of all written representations received under this section shall be appended to any report made pursuant to section 21.

Report to be made on completion of investigation

21. If, on completing an investigation of any matter, the Ombudsman is of the opinion that

(*a*) the matter should be referred to an appropriate DND or CF authority for further consideration,

(*b*) an omission should be rectified,

(*c*) a decision or recommendation should be quashed or substituted,

(*d*) a law, policy or practice on which a decision, recommendation, act or omission was based should be reviewed,

(*e*) reasons should have been given for a decision or recommendation,

(*f*) a delay should be rectified, or

(*g*) other steps should be taken to achieve substantial and long-lasting improvements to the welfare of employees and members of the DND or CF,

the Ombudsman shall send a report of the Ombudsman's recommendations and opinions, if any, and the reasons therefore, to the appropriate DND or CF authority.

Response to Ombudsman's report

22. (1) An authority that receives a report under section 21 shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response to the report.

(2) If, in the opinion of the Ombudsman, the response to a report received from the appropriate DND or CF authority is insufficient or no response is received, the Ombudsman may send a copy the report to the Deputy Minister or CDS as appropriate and in such case the Deputy Minister or CDS shall inform the Ombudsman within a reasonable time, as determined by the Ombudsman, of all steps taken or proposed to be taken in response.

(3) If, in the opinion of the Ombudsman, the response to a report received from the Deputy Minister or CDS is insufficient or no response is received, the Ombudsman may send a copy of the report to the Minister.

(4) If the Deputy Minister or CDS is directly involved in the subject-matter of the Ombudsman's report, the Ombudsman shall report the matter directly to the Minister instead of sending a copy of the report to the Deputy Minister or CDS as the case may be under subsection (2).

Administrative Matters

Annual and other reports

23. (1) The Ombudsman

(*a*) shall

(i) annually and at such other times as the Minister may require, submit a report to the Minister on the activities of the Ombudsman, and

(ii) when required by the Minister, submit reports to the Minister on the implementation of any recommendations made by the Ombudsman; and

(*b*) may, if the Ombudsman considers that it is in the public interest to do so, issue reports concerning any investigation or other matter within the mandate of the Ombudsman.

(2) A report under

(*a*) paragraph (1)(*a*) shall be published by the Ombudsman on the expiration of 10 days after it has been submitted to the Minister, or

(*b*) paragraph (1)(*b*) shall be submitted by the Ombudsman to the Minister and, if the Ombudsman considers that it is in the public interest to do so, may be published by the Ombudsman on the expiration of 10 days after it has been submitted,

and a report so published shall not be in a form that has been altered at the instance of a person other than the Ombudsman.

Ombudsman bound by policy directives

24. The Ombudsman shall be bound by any general policy directives affecting the activities of the Ombudsman that are issued and made public by the Minister.

Access to documents, etc.

25. (1) Access to any document, record or personnel by the Ombudsman shall be subject only to the privileges arising under the legislation, policy and privileges referred to in Schedule 1.

(2) Documents, records and information received by the Ombudsman shall be treated in a manner consistent with the privileges arising under the legislation and policy referred to in Schedule 2.

Correspondence and communications

26. Communications between the Ombudsman and any person shall not be covered by or counted against any restrictions on that person's right to send letters, documents or correspondence or to receive or make telephone calls.

Confidentiality and security

27. (1) The office of the Ombudsman shall be operated in a confidential and secure manner so as to protect the information received by the office in the course of its operations.

(2) Except as otherwise authorized by law,

(*a*) no communication to the Ombudsman or information provided to the Ombudsman in any form shall be disclosed by the Ombudsman, except where it is, in the opinion of the Ombudsman, subject to these Regulations, necessary for an investigation, report or other authorized purpose; and

(*b*) communications between the Ombudsman and any person in relation to the duties and functions of the Ombudsman are private and confidential.

Oath of secrecy

28. All members of the Ombudsman's staff shall, on appointment, swear an oath of secrecy.

Assistance personnel to be made available

29. To the extent that operational requirements permit, the DND and CF shall make personnel available as requested by the Ombudsman in order to provide specialized knowledge or expertise to assist the Ombudsman's activities.

Delegation of powers, etc.

30. Any of the powers, duties or functions of the Ombudsman under these Regulations, other than the power of delegation and the duty or power of submitting reports pursuant to section 23, may be delegated by the Ombudsman to any member of the Ombudsman's staff.

Communications and media matters

31. The Ombudsman shall be responsible for the Ombudsman's own communications and media relations and the Director General Public Affairs of the DND shall be available to provide communications assistance to the Ombudsman upon request.

Engaging advisers

32. Subject to any administrative framework established by the Minister in respect of the Ombudsman's office, the Ombudsman may engage such technical and professional advisers as the Ombudsman considers necessary for the proper conduct of the Ombudsman's activities.

Ombudsman's advisory committee

33. (1) The Ombudsman shall, within 6 months after these Regulations come into force, establish an Ombudsman Advisory Committee.

(2) The representation on the Committee shall be determined by the Ombudsman based on a pool of candidates approved by the Minister having regard to the need to ensure a broad based representation from the DND and CF.

(3) The Committee shall meet on a regular basis to provide the Ombudsman with advice on issues within the context of the DND and CF and concerns that have arisen in relation to the activities of the Ombudsman 's office.

Schedule 1
(*subsection 25(1)*)

1. the *Privacy Act*

2. the Government Security Policy

3. the Police Informant Identity Privilege

4. Spousal Privilege
(As defined in sections 74 and 75 of the Military Rules of Evidence, Consolidated Regulations of Canada, 1978, chapter 1049, as amended by SOR/90-306.)

5. Solicitor Client Privilege

6. Penitential Communications
(As defined in section 78 of the Military Rules of Evidence, Consolidated Regulations of Canada, 1978, chapter 1049, as amended by SOR/90-306)

Schedule 2
(*subsection 25(2)*)

1. the *National Defence Act*

2. the *Privacy Act*

3. the *Criminal Code of Canada*

4. the Government Security Policy

5. the *Access to Information Act*

6. the *National Archives of Canada Act*

7. the *Auditor General Act*

APPENDIX II - Independent Legal Counsel*

Ed Ratushny, C.M., Q.C., S.J.D.

Ed Ratushny is a Professor of Law at the University of Ottawa, and former Special Adviser to two Ministers of Justice. He has also served as an advisor to Ministers of Immigration, National Revenue, Transport and as a special envoy for the Minister of Foreign Affairs in relation to Canadians imprisoned abroad. He is an expert on the Judiciary and frequently acts for the Canadian Judicial Council in judicial conduct proceedings involving Superior Court Judges. He was recently retained as counsel to the Chief Justice of Canada.

David M. Paciocco, LL.B., B.C.L. (Oxon)

David Paciocco is a Professor of Law at the University of Ottawa, and a former Crown prosecutor. He is counsel to the firm of Edelson & Associates in Ottawa. He is an expert in constitutional law, criminal law and the law of evidence. His research is frequently cited by Canadian Courts, including on twenty occasions by the Supreme Court of Canada, and it has been relied on internationally. He is active in judicial education at all levels in Canada, and was responsible for preparing a five-year educational plan for the Ontario Court of Justice. He has acted as counsel at all levels of court, including the Supreme Court of Canada, the British Columbia and the Ontario Courts of Appeal. He has been a consultant on numerous matters, including providing legal advice and research on the law applicable to the APEC inquiry and the Minister of Justice's Self-Defence Review. He recently represented the Parliamentary Centre at Law Committee meetings held in Vietnam.

Peter Johnson, Q.C.

Peter Johnson served as Assistant Legislative Counsel to the Government of Saskatchewan prior to joining the federal Department of Justice in 1972. As Director of the P.C.O. Section of the Department, he was responsible for legal advice and drafting services related to all subordinate legislation. He subsequently became Chief Legislative Counsel, heading the Legislation Section responsible for drafting all government bills. He currently acts as a legislative drafting consultant both in Canada and internationally.

* Complete resumes are available on request.